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Supreme Court, U.S.
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CASE No. 04-

IN THE

Supreme Court of the United States

JOSE TREJO,

Petitioner,

v.

DONALD HULICK,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a four-day bench trial in the Circuit Court of Cook County, Illinois, petitioner, Mr. Jose Trejo, was convicted of one count of murder and sentenced to thirty years in prison. His two co-defendants were acquitted of the same charge. As the Illinois Appellate Court explained the different outcomes in the trial, in the case of petitioner's co-defendants, only one witness connected each of them with the crime, but in petitioner's case there were three witnesses whose testimony, collectively, was enough for conviction.

After exhausting his state court remedies, petitioner sought federal habeas corpus relief under 28 U.S.C. § 2254 arguing, among other things, that his conviction rested on insufficient evidence in contravention of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The United States District Court for the Northern District of Illinois denied his petition and his request for a Certificate of Appealability. The Seventh Circuit granted a Certificate of Appealability, heard oral argument, and affirmed the denial of petitioner's habeas corpus petition. In so ruling, however, the Seventh Circuit disregarded the standards of review under 28 U.S.C. § 2254 and the guarantees afforded under the Due Process Clause of the United States Constitution, as well as this Court's jurisprudence interpreting these standards and guarantees.

In brief, while concluding that the evidence against petitioner was "barely enough" to sustain his conviction, the Seventh Circuit conceded that the crucial testimony in this case does not on its face put petitioner at the scene of the crime. Read plainly it does not inculpate petitioner at all. But the Seventh Circuit expressly refused to accept the plain reading and construed the testimony to be inculpatory, as the lower and state courts had implicitly done. The Seventh Circuit, that is, affirmed the denial of habeas relief by putting words into the key witness's mouth, in effect

creating from whole cloth the evidence required for conviction.

The questions presented are:

1. Whether a habeas petitioner's rights under 28 U.S.C. § 2254(d)(1) have been violated when a federal habeas court departs from the record in unreasonably imputing to witness "implicit" testimony that is admittedly inconsistent with, and finds no support in, the record.

2. Whether a criminal defendant's Due Process rights are violated when a conviction can only be sustained by the courts' imputing evidence that is not only admittedly absent from the record, but admittedly contradicted by a plain reading of the record.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were Jose Trejo, as Petitioner-Appellant, and Donald Hulick, Warden, Hill Correctional Center, as Respondent-Appellee.

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PETITION FOR A WRIT OF CERTIORARI

Jose Trejo respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 380 F.3d 1031, and is reprinted at pages 1a-6a of the Appendix to this petition. The opinion of the United States Court of Appeals for the Seventh Circuit denying petitioner's Petition for Panel Rehearing and for a Rehearing *en Banc* is not officially reported, but is reprinted at page 62a of the Appendix to this petition. The opinion of the United States District Court for the Northern District of Illinois denying petitioner's application for a federal Writ of Habeas Corpus is not officially reported, but is unofficially reported at 2003 WL 548364 and is reprinted at pages 7a-19a of the Appendix to this petition. The order of the Northern District of Illinois denying petitioner's Federal Rule of Civil Procedure 59 Motion for Reconsideration is not officially reported, but is unofficially reported at 2003 WL 21462440 and is reprinted at pages 63a-67a of the Appendix to the petition. The order of the United States District Court for the Northern District of Illinois denying petitioner's Certificate of Appealability is not officially reported, but is reprinted at page 59a of the Appendix to this petition. The order of the United States Court of Appeals for the Seventh Circuit granting in part and denying in part petitioner's Certificate of Appealability is not officially reported, but is reprinted at page 60a of the Appendix to this petition.

The opinion of the Illinois Appellate Court denying petitioner's direct appeal from his conviction is not officially reported, but is reprinted at pages 20a-34a of the Appendix to this petition. The Illinois Supreme Court's denial of petitioner's Petition for Leave to Appeal is not

officially reported, but is reprinted at page 42a of the Appendix to this petition. The Circuit Court of Cook County's order denying petitioner's Petition for Post-Conviction Hearing Act Relief is not officially reported, but is reprinted at page 43a of the Appendix to this petition. The Illinois Appellate Court's order affirming the dismissal of Petitioner's Petition for Post-Conviction Hearing Act Relief is not officially reported, but is reprinted at pages 44a-57a of the Appendix to this petition. The Illinois Appellate Court's order dismissing petitioner's Petition for Rehearing of Post-Conviction Hearing Act Petition is not officially reported, but is reprinted at page 68a of the Appendix to this petition. Illinois Supreme Court's order denying petitioner's Petition for Leave to Appeal the Dismissal of Petition for Illinois Post-Conviction Hearing Act Relief, is not officially reported, but is reprinted at page 58a of the Appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's denial of petitioner's federal Writ of Habeas Corpus on August 19, 2004 and denied petitioner's Petition for Panel Rehearing and for a Rehearing *en banc* on September 16, 2004. This Court's jurisdiction is based on 28 U.S.C. § 2254 ("Section 2254") and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 2254(d)(1) provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim... (2) resulted in a decision that. . . involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court . . .

28 U.S.C. § 2254(d)(1).

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This case presents an important and recurring question of federal constitutional law that fundamentally affects the

essence of federal habeas review: Do the Due Process Clause and Section 2254 entitle a habeas petitioner to have an admittedly unambiguous record construed to mean what it says?

1. On March 13, 1997, after a four-day bench trial in the Circuit Court of Cook County, Illinois, petitioner was convicted of one count of murder. Petitioner was sentenced to thirty years in prison. Petitioner's co-defendants, Agapito Villalobos (also known as "Aggie" or the "Old Man") and George Vazquez, were acquitted of the same charge. App. 1a-7a.

2. Petitioner appealed, arguing, among other things, that the trial court had convicted him on evidence that was constitutionally insufficient to sustain a conviction. On September 24, 1998, the Illinois Appellate Court affirmed. It explained the different outcomes at trial by stating that in the cases of petitioner's co-defendants, only one witness connected each of them with the crime, but in petitioner's case there were three witnesses whose testimony, collectively, was enough for conviction:

> [Patricia] Negrete was the only witness to connect co-defendant Villalobos to the crime. [Ricardo] Gonzale[z] was the only witness to connect co-defendant Vazquez to the crime. However, both Negrete and Gonzalez connected defendant to the crime. Moreover, [Juan] Garibay further implicated the defendant. The testimony of each witness was to some degree corroborated by the testimony of the other two witnesses. Clearly, the testimony of all three witnesses was sufficient to find the defendant guilty....

App. 25a. This is a state court determination of mixed fact and law due deference under Section 2254(d), or an unreviewable statement of state law.

3. The evidence against petitioner presented by the key witnesses, Patricia Negrete, Juan Garibay, and Ricardo Gonzalez, was essentially this:

a. *Patricia Negrete*: Negrete was 15 years old at the time of the crime (November 2, 1995) and a member of the Satan's Disciples street gang. App. 81a. Negrete was interviewed by the State's Attorney on November 22, 1995 and testified before the grand jury on December 7, 1995. As summarized and read into the trial record, Negrete's statement to the State's Attorney (the "Statement"), was this:

> [S]he saw . . . Aggie [Villalobos] . . . swinging his right arm down towards the ground as if he was hitting someone. . . . She was sure it was Aggie and that she couldn't miss his bald head. App. 100a. Aggie looked up and saw her. She then heard [victim's] voice coming from the alley by Aggie saying you got me already, you motherfucker. . . . She ran home.

App. 103a. After demonstrating that she was literate, she signed the Statement at the time. App. 102a-103a. Her grand jury testimony was essentially similar. App. 89a-99a (reciting grand jury testimony). At no point in her testimony to the grand jury, or her Statement to the State's Attorney, did Negrete mention having seen or heard petitioner at or near the scene of the crime. App. 89a-99a, 100a-103a.

At trial, however, on March 5, 1997, immediately after having been examined by the prosecutor regarding her testimony to the grand jury and her Statement to the State's Attorney, the following colloquy occurred:

Q: What was in the Statement prepared by the State's Attorney?

A: What I *said*.

Q: What did you *say*?

A: That I seen who did it. . . . .

Q: Who did you see do it? . . . .

A: *I said I seen* Aggie and Vicious [petitioner] doing it . . . kill[ing] Gizmo.

Q: It's your testimony that you told the State's Attorney you saw Aggie and kill Gizmo? . . . .

A: Yes.

Q: *What did you see [petitioner] do*?

A: *Nothing*. . . . .

Q: So you told the [State's Attorney] you saw [petitioner] in the alley with [Villalobos]?

A: Yes.

Q: What did you tell them you said you saw [petitioner] do when he was in the Alley with Aggie?

A: I don't remember.

App. 104a-106a (emphasis added). This is the only portion of Negrete's direct testimony that mentions petitioner.

On cross examination, Negrete expressly denied seeing petitioner on Leavitt that evening. App. 106a ("Q: You didn't see [petitioner] on Leavit[t] that evening, did you? A: No."). Villalobos was acquitted. App. 40a.

b. *Juan Garibay*: At about 4:30 a.m. on November 2, 1995, Garibay was awakened by what sounded like gunfire, looked out of his second-story window, and saw two people dressed in men's clothing running in the

alley. App. 107a-109a. Garibay testified that he did not get a good look at the men because they were running with their backs to him. App. 109a. Garibay stated that he saw one of the two men turn around so that he could see the man's face, but only for a "couple of seconds." App. 109a. Garibay needs glasses for driving, and wears them all the time, but did not have glasses on when he looked out the window. App. 112a. He testified, however, that that he sees well without them. App. 112a.

Around November 14, 1995, Chicago Police Officer James Sanchez interviewed Garibay, and showed him a photo array. App. 110a-111a Officer Sanchez testified that Garibay told him that petitioner's photograph "looks like" the person he had seen running from the scene. App. 111a-113a. At trial Garibay stated that he picked out a picture of the person he saw running, but "in my mind it was like a doubt . . . [I was] not really sure." App. 110a. Garibay explained that there was doubt because "I get up after the noise and I look and I am not sure what I see after this point." App. 110a. Officer Sanchez wrote in a report at the time that Garibay's identification was "tentative." App. 114a. Officer Sanchez also testified that Garibay told him that he had seen petitioner in the neighborhood several months before, parking a car in front of Garibay's house. App. 114a. On November 15, 1995, Garibay was asked to examine a police line-up at the local station. Garibay picked out a person who he said "looks like" the person who was running on the night of November 2, 1995. App. 111a. Detective Luis Muñoz, who conducted the lineup, said that the person Garibay picked out of the lineup was petitioner. App. 114a.

c. *Ricardo Gonzalez*: Ricardo Gonzalez testified at trial that on November 11, 1995, he was in a restaurant, and overhead a conversation among petitioner and co-defendant Vazquez, both of whom he knew, and a third man whom he did not know. App. 78a-79a. Gonzalez stated that

they were talking about the murder. App. 79a. According to Gonzalez, Vazquez said that "the old man had them hit [Valencia]," and that Vazquez had "shot first," App. 79a; and in addition, that Vazquez heard "Joe Trejo [say] that he was the last one to shoot. He shot him with the .22." App. 80a. Gonzalez also testified that he later met Vazquez and petitioner, and Vazquez "told me whatever I knew or heard, keep it to myself or I will be found in an alley, too." App. 80a. Vazquez was acquitted. App. 40a.

4. After the Illinois Appellate Court affirmed his conviction, petitioner then filed a Petition for Leave to Appeal in the Illinois Supreme Court. On February 3, 1999, the Illinois Supreme Court denied the Petition for Leave to Appeal. App. 42a.

5. Petitioner then timely filed a *pro se* Petition for Post-Conviction Hearing Act Relief. On March 5, 1999, the Circuit Court of Cook County, Illinois, dismissed petitioner's petition. App. 43a. Petitioner, represented by counsel, then appealed to the Illinois Appellate Court. On February 2, 2001, the appellate court affirmed the dismissal of petitioner's post-conviction petition. App. 44a-57a. Subsequently, petitioner filed a petition for rehearing on the merits. The Illinois Appellate Court denied rehearing over the dissent of Justice Reid. App. 68a-71a. Petitioner then filed a Petition for Leave to Appeal to the Illinois Supreme Court. On June 29, 2001, the Illinois Supreme Court denied the Petition for Leave to Appeal. App. 58a.

6. Next, petitioner filed a *pro se* Petition for a Writ of Habeas Corpus in the United States District Court of the Northern District of Illinois. On August 21, 2002, that court appointed Mark P. Rotatori of the law firm Jones Day to represent him. Shortly thereafter, the undersigned counsel, then an associate at Jones Day, joined in representing petitioner. Petitioner's amended petition was filed on November 12, 2002, arguing, among other things, that the

state trial court violated his Due Process rights by convicting him on constitutionally insufficient evidence. The District Court denied his Petition for a Writ of Habeas Corpus, App. 7a-19a, and it subsequently denied petitioner's Federal Rule of Civil Procedure 59 Motion to Reconsider, App. 63a-67a, as well as petitioner's Request for a Certificate of Appealability. App. 59a.

7. The United States Court of Appeals of the Seventh Circuit Court granted petitioner's Request for a Certificate of Appealability on his Fourteenth Amendment Due Process claim. App. 60a-61a. After oral argument, the Appeals Court affirmed the District Court's denial of the petitioner's Request for Habeas Corpus Relief. App. 1a-6a.

8. The Seventh Circuit agreed with the Illinois Appellate Court's determination that Gonzalez's testimony required corroboration in order to satisfy Due Process. 380 F.3d at 1032-33, App. 3a-4a. In considering the sufficiency of corroboration, the Seventh Circuit discounted the weight of Garibay's "tentative," looks-like identification, describing it as "weak" and finding that Negrete's testimony provided "stronger corroboration." *Id.* at 1033. App. 3a. After reviewing Negrete's testimony, the Seventh Circuit expressly conceded that Negrete's testimony when "taken literally [ ] seems just a mistaken recollection of what was in her signed statement, which did not mention Trejo." *Id.* at 1033. App. 4a. Nonetheless the Seventh Circuit concluded that the corroborative evidence that it believed was provided by Negrete was enough, "if barely enough," to affirm petitioner's conviction.

9. On September 16, 2004, the Seventh Circuit denied Petitioner's Petition for a Panel Rehearing and for a Rehearing *en Banc*. App. 62a.

REASONS FOR GRANTING THE WRIT

This case presents a significant and recurring issue: the proper application of the standards of review under 28 U.S.C. § 2254 and the Due Process Clause in interpreting record evidence adduced at trial. As stated in *Parker v. Dugger,* 498 U.S. 308, 318-20 (1991), in determining the sufficiency of the evidence, a court cannot "ignor[e] . . . the evidence in the record." To do otherwise, as the Seventh Circuit here admits that it did, and as the state courts did throughout implicitly, violates the constitutional guarantee of Due Process. It is also inconsistent with Section 2254. Here, the Seventh Circuit states that its judgment depends on interpreting the testimony of the supposed corroborative witness in a way *contrary to what the Court itself described as* the plain meaning of that testimony. The witness unambiguously testified only about the content of her prior statements, but the Seventh Circuit construed her testimony as eyewitness evidence about what she saw on the night of the crime. Such a blatant divergence from the evidence actually adduced at trial is unconstitutional, violative of Section 2254(d), and contravenes this Court's jurisprudence. Because this Court has the crucial task of defining proper standards for review and interpretation of the evidence in a collateral attack on a criminal conviction, certiorari should be granted.

The Due Process Clause of the Fourteenth Amendment protects an accused in a criminal case against conviction except upon proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362-63 (1970). This prohibition confers on a defendant the federal right to habeas corpus relief if it is found that, on the record evidence adduced at the trial, as viewed in the light most favorable to the government, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The evidence against petitioner

when properly construed under Section 2254 reveals that petitioner is entitled to habeas corpus relief.

I. GONZALEZ'S TESTIMONY, BY ITSELF, IS INSUFFICIENT TO SUSTAIN CONVICTION.

The Seventh Circuit and the Illinois Appellate Court agree that Gonzalez's testimony, uncorroborated, is insufficient to sustain petitioner's conviction. 380 F.3d 1033. App. 3a. The state court's finding that the statement required corroboration either is entitled to deference under § 2254(d)(1) & (2), or is an unreviewable determination of state law. As the Seventh Circuit stated: "[S]ince Gonzalez's testimony was the only evidence against [Vasquez], the fact that the judge thought it insufficient to convict that man beyond a reasonable doubt does not establish that he disbelieved it; nor did he say he disbelieved it. His action signifies only that he thought the confession required corroboration. ***The question then becomes whether it was reasonable to conclude that Gonzalez's testimony was sufficiently corroborated*** by either Negrete or Garibay (or both) to justify convicting at least Trejo." 380 F.3d at 1033 (emphasis added). Accordingly, the Seventh Circuit then looked to the supposedly corroborative testimony of two other witnesses, concluding that there was enough evidence, "if barely enough," to support petitioner's conviction. *Id.* at 1034. App. 6a.

II. GARIBAY'S TESTIMONY WAS "WEAK" AND DOES NOT SUFFICIENTLY CORROBORATE GONZALEZ BY ITSELF.

The Seventh Circuit then concluded that Garibay's testimony was too weak and unreliable to provide the necessary corroboration that would support peitioner's conviction. The Appeals Court said that Garibay's "looks-like" photo identification was "something" and his subsequent picking petitioner out of the line-up after he had been primed by the tentative photographic identification,

was "something . . . less." *Id.* App. 4a. But the Seventh Circuit held that this evidence was "weak" because (1) Garibay was not wearing his glasses required by the state for driving, *id.*, App. 3a, and (2) it was "highly implausible" that he would have remembered petitioner parking his car months before when there was no evidence in the record that petitioner's appearance was "extremely distinctive."[1] *Id.*, App. 4a.

The Seventh Circuit did not reach the constitutional question, but it accepted the main thrust of petitioner's arguments on appeal and below, that Gonzalez's testimony by itself was insufficient, and Garibay's testimony was not reliable. The Seventh Circuit's finding as to Garibay does not defer to the State Appellate Court, App. 26a-27a, and so holds Garibay's identification to be unreliable by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1). If the evidence was "barely enough" to convict with both Garibay's "weak" testimony and Negrete's supposedly

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[1] Underscoring the unreliability of Garibay's "looks-like" identification" is the Ninth Circuit's opinion in *Grant v. City of Long Beach*, where the court found insufficient to create probable cause an identification where the witness "viewed her assailant standing outside her window from inside her home for only a few seconds after being startled awake" – circumstances essentially identical to those underlying Garibay's "identification." 315 F.3d 1081, 1087-88 (9th Cir. 2002) (42 U.S.C. § 1983 context); *see also* App. 23a (Illinois appellate court describing how "[Garibay] was awakened by several gunshots around 4:30 a.m. . . . He looked out his [upper-story] window . . . and saw two men . . . running from the alley . . . one of them turned around for a few seconds and Garibay saw his face."); *see also Holmes v. McKune*, 59 Fed. Appx. 239, 253-54 (10th Cir. 2003) (reversing denial of habeas relief in part on reliability grounds, noting that (1) "the victim's only opportunity to view her assailants was under poor lighting conditions," (2) the descriptions did not match, and (3) "several weeks" elapsed between the crime and the identification).

Whether Garibay's identification was constitutionally unreliable or admissible at trial is not now before this Court. Instead, Petitioner merely agrees with the Seventh Circuit's determination that the identification was not reliable on whatever grounds and cannot be used to corroborate petitioner's conviction.

"stronger" evidence corroborating Gonzalez's testimony, then it cannot be sufficient for conviction if the "stronger" corroborating evidence of Negrete is removed. Because Negrete's evidence does not inculpate petitioner, there is no corroboration.

III. AS THE SEVENTH CIRCUIT CONCEDES, NEGRETE'S EVIDENCE DOES NOT IMPLICATE PETITIONER.

The remaining evidence, the purportedly "stronger corroboration," is Negrete's testimony — testimony that, taken literally, does not implicate petitioner. 380 F.3d at 1033, App. 4a. As the Seventh Circuit admits, Negrete nowhere and never said that she saw petitioner commit the crime. The "stronger" corroborative evidence that the Seventh Circuit uses as a basis to sustain petitioner's conviction is an extrapolation that is unsupported by the record, and is inconsistent with a plain construction, or any reasonable reading, of that record.

A. The Record Will Not Support The Seventh Circuit's Conclusion That Negrete's Testimony Can Be Interpreted To Incriminate Petitioner.

The trial record is clear and unambiguous. In two statements made within weeks of the crime, one to the State's Attorney and another essentially identical sworn statement to the Grand Jury, Negrete inculpated only Villalobos. She did not mention petitioner in those pretrial statements. As the Seventh Circuit pointedly noted with respect to her statement to the State's Attorney, "there is no mention of Trejo in the statement [to the State's Attorney] itself." *Id.* at 1032, App. 2a. At trial, however, Negrete testified that she "***told the state's attorney*** [she] saw Aggie and [petitioner] kill Gizmo." *Id.* at 1034 (emphasis added), App. 5a. The Court concedes that: "[a]sked point blank what she saw on the night of the murder, she said that she saw nothing. But she was insistent, indeed emphatic, that

she had told the state's attorney that she had seen Trejo." *Id.* App. 4a. Crucially, the Court admits that "***if taken literally, [Negrete's testimony] seems just a mistaken recollection of what was in her signed statement, which did not mention Trejo***." *Id.* (emphasis added). App. 4a.

This should have been an easy case. Gonzalez's testimony required corroboration. That was not provided by Garibay, whose testimony was too weak to be reliable. Nor was it provided by Negrete, who never implicated petitioner. Yet despite recognizing that neither Negrete's pre-trial statements nor her trial testimony put petitioner at the scene of the crime, the Seventh Circuit nonetheless concluded that she provided the necessary corroboration.[2] That is to say, from: (a) two entirely consistent pre-trial statements that do *not* place petitioner at the scene of the crime, and (b) one erroneous description of her own pre-trial statements that does not address what she saw at the scene, the Seventh Circuit inferred (c) that Negrete nonetheless placed petitioner there. This judicial creativity violated petitioner's statutory and constitutional rights.

B. The Seventh Circuit's Imputation To Negrete of Something She Never Said Violates Section 2254.

The habeas statute demands deference to reasonable state court determinations, *see* 28 U.S.C. § 2254(d)(1) & (2), but this Court and other courts have rejected judicial factual conclusions that have no basis in the record. Where a court, as here, must in effect make up the testimony on which it bases the denial of relief, it has crossed the line drawn by Section 2254 and this Court.[3]

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[2] The trial court did not expressly find that Negrete's testimony inculpated petitioner. App. 35a-41a. The state appellate court concluded that Negrete's testimony implicated petitioner, but did not explain its conclusion. App. 22a, 24a-26a.

[3] This point could not have been raised in this way until after the Seventh Circuit issued its opinion.

Just as federal habeas courts must defer to reasonable state court factual determinations, so, too, are they bound by what is actually in the record. Under Section 2254, "[t]he State is entitled to every reasonable inference that may be drawn from the record, but to be reasonable the inference must find at least some support in the facts." *McFowler v. Jaimet*, 349 F.3d 436, 451 (7th Cir. 2003). The petitioner is entitled to have the court's interpretation respect the record and not insert nonrecord "evidence" that has no basis in the record, much less imaginative efforts that the court itself admits are inconsistent with a plain reading of the record. A state court decision is "unreasonable if it is devoid of record support for its conclusions or is arbitrary." *Norton v. Spencer*, 351 F.3d 1, 8 (1st Cir. 2003) (internal citation omitted). Neither can a federal habeas court justify its extrapolations under the aegis of "reasonableness" if it imputes an interpretation of the evidence that is unfounded in the facts and contradicted by the record on its face. If the court must defer to reasonable interpretations, the petitioner is entitled to the record as it is, not as a court might wish it to be.

Petitioner is aware that "[w]hen a state appellate court, confronted with a facially ambiguous trial court statement, adopts one of two possible interpretations, a federal habeas court must abide by that choice, so long as no record evidence extrinsic to the statement renders implausible the state court's interpretation." *Holland v. McGinnis*, 963 F.2d 1044, 1049 (7th Cir. 1992) (citing *Parker*). In the present case, however, there is nothing ambiguous about Negrete's statement. When read literally, as the Seventh Circuit admits, the trial testimony that the courts used to corroborate Gonzalez's testimony is merely a mistaken recollection of Negrete's statement to the State's Attorney. Neither statement implicated petitioner.[4] Nor did Negrete

[4] In addition, for reasons more fully discussed in Section III.D *infra*, there is record evidence extrinsic to that statement that renders implausible the Seventh Circuit's reinterpretation of this statement.

ever make any statement that *did* implicate petitioner. In the absence of ambiguity,[5] the plain meaning of Negrete's testimony is the one required under Section 2254.

C. Due Process Requires a Court on Habeas Review To Respect the Trial Record.

The Seventh Circuit's disregard for the record flatly violates Due Process. In *Parker*, 498 U.S. at 320, this Court overruled the Florida Supreme Court's factual finding about the existence of mitigating factors in a death sentencing context because it was not supported by trial court record. "What the [state supreme court] could not do, but what it did, was to ignore the evidence . . . in the record." *Id.* at 320. In that case, the trial court had stricken two of the aggravating circumstances, and "must have found mitigating circumstances," but the State Supreme Court incorrectly held that the trial court had found "no mitigating circumstances." *Id.* at 318. Petitioner's case does not involve, with respect to Negrete's testimony, appellate misconstrual of trial court findings, but it does involve appellate reliance on "'findings' of the trial court that bear no necessary relation to this case." *Id.* at 322. Here, these include the state trial court's apparent and the state appellate court's explicit construction of Negrete's testimony as incriminating petitioner, neither of which had record support.

The same constraints apply where a federal appellate court departs from the record by enchancing the record. In *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), this Court reversed the Maryland Supreme Court in another death sentencing case because that court in effect invented

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[5] There is an ambiguity in Negrete's testimony about *Villalobos*: her pretrial statements implicated him, her trial statements contradicted those statements. Yet no matter which way those statements are reconciled, they tend to *exculpate* petitioner. Either Negrete saw Villalobos *alone* committing the crime, or she saw nothing at all. In either event she never said she saw petitioner at the scene.

evidence that petitioner's attorney must have conducted psychological investigations for mitigation, the existence of which was unsupported by the record. "[T]he record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one we have described." *Id.* at 2540; *see also Miller-El v. Cockrell*, 537 U.S. 322, 340-341 (2003) (reproving denial of Certificate of Appealability because underlying courts did not "give full consideration to the substantial evidence petitioner put forth in support of the prima facie case"); *Amadeo v. Zant*, 486 U.S. 214, 228 (1988) (reversing Eleventh Circuit's finding of no deliberate bypass under old habeas law because the court "engage[d] in impermissible appellate factfinding") (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-715 (1986)); *Wright v. Walls*, 288 F.3d 937, 945 (7th Cir. 2002) (reversing the Illinois Supreme Court on the same grounds as in *Parker*, and holding that "accurate factual characterization depends upon 'an examination of the transcript . . . .'"). Indeed, it is "a fundamental rule of appellate review, one which is anchored in elementary principles of due process, to the effect that appellate courts are not to go outside the record." *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1138 n.6 (1st Cir. 1996).

As these authorities make clear, the federal courts have not hesitated to reverse or vacate, as violative of Due Process, decisions of state and lower federal courts that have ignored or generated the evidence in the record. Here, the Seventh Circuit admits than an accurate examination of the transcript leads to a conclusion opposite to the one it should have reached if the witness were understood to mean what she said. In order to find that Negrete's testimony corroborated Gonzalez's, it had to put words into her mouth. In doing so, the Seventh Circuit violated Due Process.

D. The Seventh's Circuit's Reasons for Departing From the Record Are Untenable.

The Seventh Circuit's non-literal interpretation of Negrete's testimony is indefensible. The Seventh Circuit's decision rests on the notion that Negrete erroneously remembered having told the prosecutor that petitioner "had been one of the murderers because he *had* been one of the murderers." 380 F.3d at 1033 (emphasis in original), App. 4a.. In the face of the plain meaning of Negrete's record testimony, the Seventh Circuit offers two reasons for a conclusion it describes as "quite plausible:" (1) the fact that Negrete was a "recalcitrant witness," and (2) the observation that Negrete's testimony about "what [she] told the police and the state's attorney" was inconsistent, because she said at one point that she *told* the state's attorney that she saw petitioner commit the crime, and at another point testified that she did not remember what she *said* she told the state's attorney that she saw petitioner do.[6] *Id.*, App. 4a-6a. These reasons, however, do not warrant putting words into Negrete's mouth that she did not say and that are not elsewhere supported by the record.

Federal courts have held that "mere suspicion or speculation cannot be the basis for creation of logical inferences. *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986), *amended in other respects*, 798 F.2d 1250 (9th Cir. 1986) (non-habeas context); *United States v. Brown*, 763 F.2d 984, 990 (8th Cir. 1985) ("a conviction based on evidence that requires speculation or mere conjecture by the [factfinder] is invalid"). Where, as here,

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[6] The Seventh Circuit also offered a rhetorical question to support its non-literal construction: "Why else would she have remembered having told the state's attorney this?" *Id.* "[F]or all good rhetorical questions, the answer is self-evident," *United States v. Lawrence*, Nos. 97-4006, 97-4007, 1997 WL 563134, at *3 (4th Cir. Sept. 11, 1997), but here, the answer to the question posed by the Court is anything but self-evident.

there is no "testimonial basis" for a key factual conclusion, Section 2254 should afford relief. *See Taylor v. Mitchell*, 296 F. Supp. 2d 784, 825 (N.D. Ohio 2003) (granting writ because insufficient evidence where state courts' conclusion not supported by the record).

As explained, the Seventh Circuit's conclusion was unreasonable because it was unsupported by, and inconsistent with, the record, constituting mere suspicion or speculation. The mere fact that Negrete misremembered what she had *told the State's Attorney* cannot be a reasonable basis for attributing to her a statement that she not only never made, but which she flatly denied was true. That is just conjecture. Negrete was absolutely consistent that she did not see petitioner at the scene of the crime. Nothing in the record supports the inference that she did see him there or really meant something she never said. Moreover, the record, reasonably interpreted, points in the opposite direction.

First, Negrete failed to implicate petitioner in her statements to the State's Attorney and the grand jury close to the time of the crime. In those statements, she gave a vivid and detailed description of the crime — Villalobos's unmistakable bald head, his swinging arm, and the victim's scream "You already got me." App. 22a. But she did not mention petitioner – the reasonable inference was because she did not see him there.

Second, while Negrete may have been a recalcitrant witness whose trial testimony may have been a "result of [ ] fear," as the Illinois Appellate Court said, App. 27a, her earlier statements cannot be described as so tainted. In her pretrial statements, Negrete implicated Villalobos, whom she knew as a leader of the gang, App. 82a, and believed to be capable of murder. Nothing in the record indicates that she had any reason to fear petitioner more than Villalobos. Yet she did not mention petitioner in her pretrial statements.

In any event, other, more reasonable, explanations for Negrete's misrecollection exist that, unlike the one adopted by the Seventh Circuit, are supported by the record. Here, Negrete was a notably unclear witness, as the prosecutor remarked, who had trouble remembering what she had said a few moments ago:

> Q: Didn't you just say a few moments ago in this very courtroom when I asked you those questions that you did give those answers just about five minutes ago?
>
> A: No....
>
> Q: So you don't remember what happened only five minutes ago?
>
> A: No.

App. 84a. It is in the record (and uncontroverted) that Negrete's memory was extremely poor,[7] a fact which offers far simpler and more plausible explanation of the error in her testimony about the Statement than the Seventh Circuit's surmise about an "implicit acknowledgement" that that she had seen petitioner commit the crime. 380 F.3d at 1034. The interpretation put on her words by the Seventh Circuit is mere speculation unsupported by the record. *See Lewis*, 787 F.2d at 1323.

The Seventh Circuit also asserts that treating Negrete's statement as eyewitness testimony — imputing to her a third statement which she never made — somehow helps to reconcile Negrete's statements that (a) she told the State's Attorney she saw petitioner at the scene committing the crime, and (b) she did not remember what she told the

---

[7] The Prosecutor, frustrated with Negrete's muddled responses, asked Negrete whether she had "a problem with her mind," had a "mental deficit," was "retarded or anything," or had a "learning problem." App. 84a-85a.

State's Attorney she saw petitioner do. *See* 380 F.3d at 1033, App. 4a-6a. This is quite odd. As noted, Negrete *never* said that she saw petitioner at the scene — not to the state's attorney, not to the grand jury, and not at trial. When asked, she denied that she had seen him. The conflict that the Appeals Court considers here only concerns her testimony about what she *told* the state's attorney. It is not apparent how it squares the conflict in her confused trial testimony about her prior Statement to impute to her something she never said about what she saw. Indeed, it is so unclear as to be wholly unreasonable.

When all is said and done, the plain interpretation of Negrete's trial testimony is the one required by the habeas law and the Due Process clause as interpreted by this Court. Anything else departs from the record in a way that is unreasonable and unconstitutional. Because on a literal construction of her trial testimony, Negrete did not incriminate petitioner, but only misdescribed her prior statements, her testimony cannot serve as corroboration for Gonzalez's testimony. Because Negrete's testimony is necessary corroboration for petitioner's conviction in a case where the Seventh Circuit admits that the evidence of three witnesses is "barely enough" for conviction, 80 F.3d at 1034, App. 6a, the evidence against petitioner is constitutionally insufficient for conviction. This Court should grant certiorari to determine whether to reverse or vacate the judgment of the Seventh Circuit.

IV. THE QUESTION PRESENTED BY THIS CASE IS IMPORTANT AND RECURRING.

This case presents crucial and recurring issues in the interpretation of evidence in a habeas context, specifically concerning the scope of reasonableness in a court's freedom to interpret record evidence. The questions concern both Due Process in upholding convictions that depend on evidence not in the record and imputed there by the Courts, and also the understanding of the degree of deference due to

state court determinations in light of the record. This Court has held in *Parker* and *Wiggins* that neither state nor federal courts can ignore or add to the record without violating Due Process.

Petitioner's is a noncapital conviction case rather than a death sentencing case like *Parker* and *Wiggins*. Yet nothing in the Due Process Clause or this Court's jurisprudence suggests that Due Process stops at the death cell door. This case offers this Court the opportunity to expressly extend to the noncapital sentencing contexts the Due Process requirement of fidelity to the record it imposed in *Parker* and *Wiggins*.

Likewise, this case offers this Court the opportunity to make clear the scope and limits of reasonable inferences under Section 2254(d), underlining that the deference due to state court factual determinations carries with it a corresponding obligation to confine those inferences within the limits of the record, and not to omit or add material facts not found in the record. These issues recur in many habeas corpus cases under Section 2254, and yet the posture of the present case is unusual enough that it is unlikely that a judgment for petitioner on the grounds that he seeks would trigger many new or successive petitions, because it is perhaps more likely that petitioners will seek to avoid rather than to insist on plain and literal readings of the evidence.

Nonetheless, the right to be tried on only the evidence in the record – a right extending back to Magna Carta – is so fundamental to Due Process, and the constraint of fidelity to the record on the Courts' reasonable determinations of the facts under Section 2254 is so basic to a petitioner's rights under the habeas statute, that this case presents issues that warrant this Court's issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

CONCLUSION

For the foregoing reasons petitioner submits that the petition for a Writ of Certiorari should be granted and thereupon requests briefing on the merits and oral argument. Alternatively, petitioner requests that the Court grant his Petition for Writ of Certiorari, vacate the decision of the United States Court of Appeals of the Seventh Circuit, and remand with instructions to comport its decision with the requirements of Section 2254 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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December 15, 2004

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3563

JOSE TREJO, Petitioner-Appellant, v. DONALD HULICK, Respondent-Appellee.

Appeal from the United States District Court for the

Northern District of Illinois, Eastern Division.

No. 02 C 4387 Paul E. Plunkett, Judge.

ARGUED AUGUST 3, 2004

DECIDED AUGUST 19,2004

Before POSNER, ROVNER, and DIANE P. WOOD, Circuit Judges.

POSNER, Circuit Judge. Jose Trejo was convicted in an Illinois state court of murder, and after exhausting his state remedies sought federal habeas corpus, lost in the district court, and appeals. He argues that no reasonable trier of fact could have found that there was enough evidence to support a finding of guilt beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 307 (1979), and that the state appellate court was unreasonable to suppose there was and so he is entitled to relief under 28 U.S.C. § 2254(d)(l) (unreasonable application of a rule of federal law clearly established by the U.S. Supreme Court).

"Vicious" Trejo and "Aggie" Villalobos were members of a gang called Satan's Disciples, as was Danny Valencia. The night after a gang meeting at which Valencia and Villalobos clashed, Valencia was murdered. Trejo, Villalobos, and a third gang member were prosecuted for

the murder. At the conclusion of a bench trial, the judge convicted Trejo while acquitting the other two defendants.

The case against Trejo rested on the testimony of three witnesses. (In contrast, the cases against his codefendants rested on just one witness each.) One of them, Patricia Negrete, another Satan's Disciple, had given a state's attorney a signed statement that hearing gunshots emanating from an alley near where she lived she had run to the alley's entrance and seen Villalobos swinging his right arm at someone lying on the ground and heard the victim cry out, "You've already got me." At trial Negrete proved to be a hostile witness and denied having seen anything. But confronted with her signed statement, she testified that she had told the state's attorney who had written up the statement that she had seen Trejo and Villalobos kill Valencia, though there is no mention of Trejo in the statement itself.

The second witness, Juan Garibay, shown a photo array that included Trejo, told the police that Trejo looked like one of the men whom he had seen from the window of his house running in the alley on the night of the murder and several months earlier had seen park a car in front of the house. (He later identified Trejo in a line-up, as well.) On the night of the murder, however, Garibay was not wearing his glasses; although he is required to wear them when driving, he testified that he sees fine without them. He also testified, contrary to what he had told the police, that he didn't recall ever having seen Trejo. He added, however, that his family had been threatened if he testified, and this may explain his recantation.

The third witness, Ricardo Gonzalez, another Satan's Disciple, testified to having heard Trejo and the third defendant admit murdering Valencia. Gonzalez testified that he too was afraid of retribution for testifying.

Trejo contends that Negrete did not implicate him in either her statement or her testimony; that Garibay's identification of him as one of the men in the alley was wholly unworthy of belief; and that the trial judge must have disbelieved Gonzalez's testimony because the judge acquitted the third defendant, whom Gonzalez had implicated equally with Trejo. But given our deferential standard of review, which requires us to consider not whether the state courts were incorrect but whether they were unreasonable, we cannot allow Trejo to peel the onion in this fashion. Always to be borne in mind is that "a number of weak proofs can add up to a strong proof." *Mataya v. Kingston*, 371 F.3d 353,358 (7th Cir. 2004); *see also Rowan v. Owens*, 752 F.2d 1186, 1188-89 (7th Cir. 1984); cf. *United States v. Jakobetz*, 955 F.2d 786, 793, 798-800 (2d Cir. 1992). Trejo misses the point in mounting separate at-tacks against each of the three witnesses without considering that the whole might be greater than the sum of the parts.

To start at the back end: since Gonzalez's testimony was the only evidence against the third man, the fact that the judge thought it insufficient to convict that man beyond a reason-able doubt does not establish that he disbelieved it; nor did he say he disbelieved it. His action signifies only that he thought the confession required corroboration. The question then becomes whether it was reasonable to conclude that Gonzalez's testimony was sufficiently corroborated by either Negrete or Garibay (or both) to justify convicting at least Trejo.

While not entirely without probative value, Garibay's evidence was weak, although this was not because of his recantation, which is easily explained by the threats to his family. One problem is his glasses. Glasses for driving correct problems with distance vision, so if Garibay had testified that he can read fine without his glasses, that would be believable. But to see a man in the alley from his house

would presumably require the use of his distance vision, and if he could see the man without his glasses one wonders why he needs glasses for driving. Still, we do not know how far away the man was when Garibay saw him; he might have been at a point in the alley just outside Garibay's window.

There is a bigger hole in his testimony: it is highly implausible that he would have remembered Trejo from having seen him park his car months earlier, unless Trejo's appearance is extremely distinctive, which is not suggested. Even so, while Garibay's picking out Trejo in the photo spread may have been just a lucky guess, it is something. His picking him out of the line-up later was something too, though less. Having identified Trejo from his photograph, Garibay would have been primed to pick him out of a line-up as well; yet if mistaken the first time he might have caught his mistake when confronted with the person, since what he had seen in the alley on the fatal night was a person rather than a photograph.

Negrete's testimony provides stronger corroboration of Gonzalez's. True, if taken literally it seems just a mistaken recollection of what was in her signed statement, which did not mention Trejo. But there are alternative interpretations. One, which seems however quite implausible, is that Negrete told the state's attorney who took down her statement that Trejo was one of the murderers, but the state's attorney somehow neglected to record this crucial accusation. The second interpretation, which is quite plausible, is that Negrete remembered (erroneously) having told the prosecutor that Trejo had been one of the murderers because he *had* been one of the murderers—she had seen him in the alley. Indeed, why else would she have remembered having told the state's attorney this? Remember that she was a recalcitrant witness. Asked point blank what she saw on the night of the murder, she said she saw nothing. But she was insistent, indeed

emphatic, that she had told the state's attorney that she had seen Trejo.

Here is the relevant testimony:

Q: What was in the statement prepared by the state's attorney?

A: That I seen who did it.

Q: That you seen him?

A: I said I seen Aggie and Vicious doing it.

Q: You said you saw Aggie and Vicious do what.

A: Kill Giz?

Q: Kill what?

A: Kill Gizmo [Valencia].

Q: It's your testimony that you told the state's attorney you saw Aggie and who kill Gizmo?

A: Vicious.

Q: And Vicious kill Gizmo?

A: Yes.

Q: What did you see Vicious do?

A: Nothing.

Q: So you didn't see Vicious do anything?

A: Correct.

Q: And your testimony today is that you told the police and the state's attorney that Vicious is someone you saw there that night?

A: Saw what night? When it happened?

Q: That's the only night we are talking about, Ms. Negrete.

A: I didn't see nobody that night.

Q: My question was did you tell the police and the state's attorney that you saw Vicious out there that night?

A: Yes.

Q: What did you tell them you saw Vicious do when he was in the alley with Aggie?

A: I don't remember.

Notice that after admitting that she had told the police and the state's attorney that she'd seen Vicious killing Valencia, she testified that she didn't remember what she'd seen Vicious doing. One way to dissolve the contradiction is to interpret her testimony as a whole as an unguarded and implicit, but nevertheless credible, acknowledgment that she had indeed seen Trejo commit the murder.

There was enough evidence—if barely enough, given the well-known vagaries of eyewitness identification, *see, e.g.*, Gary L. Wells & Elizabeth A. Olson, "Eyewitness Testimony," 54 Ann. Rev. Psych. 277 (2003)—to support Trejo's conviction. The denial of habeas corpus relief is therefore: AFFIRMED.

A true Copy: Teste: Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court
Northern District of Illinois
Eastern Division

USA ex rel. Jose Trejo v. James Schomig

JUDGMENT IN A CIVIL CASE

FEB 25, 2003

Case Number: 02 C 4387

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

x Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Petitioner Trejo's section 2254 petition is denied and this case is dismissed.

Date: 2/24/2003

Michael W. Dobbins, Clerk of Court

/s/

Theresa B. Kinney, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES, ex. rel.
JOSE TREJO,

Petitioner,

v.

JAMES SCHOMIG,

Respondent

No. 02 C 4387
Paul E. Plunkett,
Senior Judge

MEMORANDUM OPINION AND ORDER

Jose Trejo has filed a petition pursuant to 28 U.S.C. § 2254 ("section 2254") to set aside his conviction. For the reasons set forth below, the petition is denied and this case is dismissed.

Procedural Background

In 1997, Trejo was convicted of first-degree murder and sentenced to thirty years in prison. (Gov't Ex. D, *People v. Trejo*, No. 1-97-2733, slip op. at 1 (Ill. App. Ct. Sept. 24, 1998).) The Illinois Appellate Court affirmed Trejo's conviction and sentence on September 24, 1998. (*Id.* at 2.)

Trejo then filed a petition for leave to appeal to the Illinois Supreme Court. That court denied Trejo's petition on February 3, 1999. (Gov't Ex. F, *People v. Trejo*, No. 86501 (Ill. Sup. Ct. Feb. 3, 1999) (order denying petition for leave to appeal).)

After the proceedings on his direct appeal were complete, Trejo filed a pro se petition for post-conviction relief. That petition was denied on March 5, 1999, by the

trial court without an evidentiary hearing. (Gov't Ex. H.) The denial of Trejo's petition for post-conviction relief was affirmed on February 2,2001. (Gov't Ex. L, *People v. Trejo*, No. 1-99-1408, slip op. at 1 (Ill. App. Ct. Feb. 2,2001).) Trejo then filed a petition for rehearing on the merits. The Illinois Appellate Court denied the rehearing on April 12, 2001. (Pet'r Ex. G.)

Trejo filed a petition with the Illinois Supreme Court for leave to appeal. The supreme court denied his petition on June 29,2001. (Gov't Ex. O, *People v. Trejo*, No. 91552 (Ill. Sup. Ct. June 29, 2001) (order denying petition for leave to appeal).)

Discussion

In his section 2254 petition, Trejo raises three claims: (1) that his conviction rests on insufficient evidence and thus his due process rights have been violated; (2) that his Fourth Amendment rights were violated by an arrest without probable cause[1]; and (3) that his Sixth Amendment right of confrontation was violated when a witness's grand jury testimony was admitted as substantive evidence.

We can reach the merits of these claims only if Trejo "raised all of [them] during the course of the state proceedings, presenting each claim fully and fairly to the state courts." *Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999). "A petitioner presents his claims fully by pursuing all available avenues of relief provided by the state before turning to the federal courts." *Id.* (internal quotation marks and citation omitted). A petitioner presents his claims fairly if he gives the state courts "a meaningful opportunity to pass upon the substance of the claims later presented in

[1] Trejo characterizes this claim both as a violation of his Fourth Amendment rights and as an ineffective assistance of counsel claim because his appellate counsel did not raise the issue on direct appeal.

federal court." *Id.* Both the operative facts and the "controlling legal principles" must be submitted to the state court. *Id.* (internal quotation marks and citation omitted). If a petitioner does not raise his claims in a petition for a discretionary appeal to the state supreme court, he cannot satisfy this requirement. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process").

Respondent has failed to raise a procedural default defense for Trejo's first (insufficiency of evidence) and third (violation of Sixth Amendment right of confrontation) claims, and so we will address the merits of those claims. *See United States ex. rel. Gonzalez v. DeTella*, 918 F. Supp. 1214, 1219 (N.D. Ill. 1996). However, Trejo's second claim (violation of Fourth Amendment rights/ineffective assistance of counsel) is procedurally defaulted.[2] Trejo asserts that his appellate counsel was constitutionally ineffective because he (Trejo's counsel) failed to raise on direct appeal Trejo's Fourth Amendment violation claim, which is "the trial court's improper denial of [ ] Trejo's motion to quash his arrest." (Pet'r. Am. Pet. at 11.) This claim was not raised until Trejo appealed the dismissal of his post-conviction petition and it was characterized at that time as an ineffective-assistance-of-counsel claim. The Illinois Appellate Court dismissed Trejo's claim and articulated an independent and adequate state-law ground for doing so - forfeit under Illinois' Post-Conviction Hearing Act, 725 ILCS 5/122-1 et. seq.[3] The court's discussion of the

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[2] In his pro se post-conviction petition, Trejo raised an ineffective-assistance-of-counsel claim as it relates to his trial counsel's failure to investigate a particular fact that supported a witness's identification. (Gov't Ex. G at A36-37.) The claim here involves a different alleged deficiency of appellate counsel and was made for the first time when Trejo appealed the denial of his post-conviction petition.

[3] The court stated:

cause and prejudice test of the fundamental fairness doctrine, and its related examination of the issue's merits, does not detract from its express statement that Trejo failed to adhere to the state's own procedural rules. *See Harris v. Reed*, 489 U.S. 255, 259 n.10 (1989) ("[b]y its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law").

Despite the default, we can still reach the merits of this claim if Trejo can show adequate cause for having failed to raise his claim on appeal and actual prejudice resulting from the default. *See Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir. 1991). Absent such a showing, a defaulted claim is reviewable only if the violation would result in a "fundamental miscarriage of justice." Rodriquez, 193 F.3d at 917.

The cause for his failure to raise his Fourth Amendment claim in prior proceedings is the ineffective assistance of appellate counsel. Trejo's appellate counsel failed to raise on direct appeal the issue of an improper arrest. In *Edwards v. Carpenter*, 529 U.S. 446 (2000), the Supreme Court stated an ineffective-assistance-of-counsel claim asserted as a cause for a procedural default "is itself

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(continued...)

In other words, if defendant had asserted that the alleged waiver [of the claim] had stemmed from ineffective assistance of appellate counsel prior to his post-conviction petition, waiver would not apply to his ability to pursue the claim in his post-conviction petition. However, since defendant has proceeded beyond that stage and failed to reference this issue in his post-conviction petition, section 122-3 of the Act mandates that he has effectively forfeited this issue by not advancing it the second time around. *People v. Trejo*, No. 1-99-1408 (Gov't. Ex. L at 5-6).

an independent constitutional claim .... [and] that constitutional claim, like others, [must] be first raised in state court." *Id.* at 451-52 (emphasis in original). Thus, Trejo must find a sufficient "cause" for his failure to raise this ineffective-assistance-of-counsel claim. "Cause" is "'some objective factor external to the defense' which precludes petitioner's ability to pursue his claim in state court." *Dellinger v. Bowen*, 301 F.3d 758, 766 (7th Cir. 2002) (citing *Murray v. Carrier*, 477 U.S. 478,492 (1986).) Trejo offers the fact that he filed his post-conviction petition pro se and that circumstances at his prison contributed to his failure to assert his claim. These reasons are insufficient to establish "cause" to excuse a procedural default of a claim.

Trejo does not have a constitutional right to counsel in post-conviction proceedings, *see Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996), and "where the State has no responsibility to ensure that petitioner was represented by competent counsel ... it is the petitioner who must bear the burden of a failure to follow state procedural rules." United *States v. Coleman*, 501 U.S. at 754. 1270,1272 (7th Cir. 1990). *See United States ex rel. Galvan v. McVicar*, 2000 WL 1780351, *4-5 (N.D. Ill. Dec. 4, 2000) (discussing numerous cases where lack of education, illiteracy, proceeding pro se, prison rules and similar circumstances do not constitute "cause" to excuse a procedural default). Because Trejo is unable to show cause to excuse his default, we need not reach the issue of whether he could establish prejudice. *Dellinger*, 301 F.3d at 767.

Nor has Trejo shown that our failure to review his defaulted claim would result in a fundamental miscarriage of justice. That exception only applies when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Rodriguez, 193 F.3d at 917 (internal quotation marks and citation omitted). Trejo has not demonstrated that he is actually innocent of the crime for which he was convicted; in fact, he does not

even argue that we review his claim on this basis. Thus, the fundamental miscarriage of justice exception does not apply in this case.

Our review of the remaining claims is controlled by section 2254, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved, an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d)(l) and (2).

Insufficiency of Evidence

Trejo claims that the evidence in his case is insufficient to sustain his conviction beyond a reasonable doubt. He claims specifically that the state court unreasonably based his conviction on the testimony of three witnesses, where, in each case, the testimony of the witness was deficient.[4]

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[4] Trejo claims that one witness did not actually identify him, one witness did not implicate him, and one witness was found by the trial court to be unreliable.

Because this claim implicates a mixed question of law and fact, it is governed by the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979): whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Our review, then, turns on "whether the state court provided fair process and engaged in reasoned, good-faith decision making when applying Jackson s 'no rational trier of fact' test." *Gomez v. Acevedo*, 106 F.3d 192,198 (7th Cir. 1996), vacated on other grounds, 522 U.S. 801 (1997). When the issue is a "matter of degree, rather than of concrete entitlements,.... a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment." *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996).

The appellate court began its review of Trejo's first degree murder conviction by correctly noting that its function was not to retry Trejo, but to apply the Jackson standard. (Gov't Ex. D at 6.) The appellate court recognized that matters relating to the weight given to any particular testimony and the credibility of any witness are determinations within the province of the trier of fact. (*Id.* at 8.) The trier of fact is to "fairly ... resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jacskon*, at 319.

This case involved a gang-related shooting and the evidence showed that certain witnesses had been threatened and were reluctant to testify. The appellate court was cognizant of this fact and recognized that "[t]he trial judge was in the best position to observe [witnesses'] behavior and see through the witness' attempts to distance themselves from their original statements and grand jury testimony." (Gov't Ex. D at 9.) The appellate court then went on to

address each of Trejo's complaints regarding witness testimony, keeping in mind the Jackson test.

The appellate court ruled unanimously that the evidence was sufficient to sustain Trejo's conviction. The court was familiar with the trial evidence and used this evidence in its reasoning. With respect to Garibay's identification testimony, the court cited relevant factors to be considered in evaluating the reliability of an identification, looked to the evidence in the record and found support for the trial court's determination. (*Id.* at 9-10.) *See Gomez*, 106 F.3d at 200-01.

As for Trejo's objections to Gonzalez' and Negrete's testimony, the appellate court deferred to the trial court judge who, as the trier of fact, made decisions about the credibility of each witness (and the weight due the testimony) and resolved matters raised by conflicting evidence. (*Id.* at 8.) After considering all of the evidence before the trial court, the appellate court found that a rational trier of fact could have found in the way the trial court did. (*Id.* at 10.) Once a defendant has been found guilty of the crime charged, the "factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319.

Trejo complains that it is unreasonable to sustain his conviction based on the witnesses' testimonies when the same testimonies could not support his co-defendants' convictions. The appellate court found, however, that the co-defendants were not tried on the same set of facts. (Gov't Ex. D at 8.) Viewing the evidence in the light most favorable to the prosecution supported the determination that the trial court did not err in finding sufficient evidence to convict Trejo. (*Id.* at 12.) *See Jackson*, 443 U.S. at 326 ("a federal habeas corpus court faced with a record of

historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution"). Because the state court correctly identified the governing legal standard and reasonably applied it to the facts of this case, its conclusion that Trejo's conviction is supported by legally sufficient evidence provides no basis for habeas relief.

Sixth Amendment Right of Confrontation

Trejo claims that his Sixth Amendment right of confrontation was violated when the trial court admitted as substantive evidence certain grand jury testimony of Patricia Negrete, an "unwilling" witness. We find this claim also provides no basis for habeas relief.

This claim implicates a mixed question of law and fact, *see Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986), and Trejo's claim for relief on this issue will be denied if the state court's application of clearly established Supreme Court law was reasonable. *Spreitzer v. Peters*, 114 F.3d 1435, 1441 (7th Cir. 1997). In this case, however, on both direct appeal and post-conviction petition appeal, the state court considered Trejo's claim regarding the admission of Negrete's grand jury testimony as an evidence question, i.e., whether the admission was in conformity with 725 ILCS 5/115-10.1 (Admissibility of prior inconsistent statements). The question was not presented to the state court specifically as a Confrontation Clause question and so this specific constitutional claim was not fairly presented to the state court for resolution.[5] Respondent has not made any

[5] In contrast, Trejo did raise the specific Sixth Amendment right of confrontation claim with respect to the testimony of Ricardo Gonzales. (Gov't Ex. A at 27-34.)

procedural default argument, though, and so we consider Trejo's claim on the merits.

The Confrontation Clause of the Sixth Amendment involves the right of a defendant to confront the witnesses against him. *See Delaware v. Fensterer*, 474 U.S. 15 (1985). The "literal right to 'confront' the witness at the time of trial... forms the core of the values furthered by the ... Clause." *Id.* (citing *California v. Green*, 399 U.S. 149,157 (1970)). The Confrontation Clause does not guarantee that a witness's testimony will not be "marred by forgetfulness, confusion, or evasion." *Id.* at 22.

Trejo relies on *Douglas v. Alabama*, 380 U.S. 415 (1965), for support of his claim. In that case, the Court found that Douglas's right of confrontation was violated when the witness, Douglas's co-conspirator, invoked his privilege against self-incrimination and refused to answer any questions. The witness was declared a hostile witness and portion's of his confession, which implicated Douglas, were read into evidence. The right of confrontation was violated here because Douglas had been denied the opportunity to cross-examine the witness and the witness's confession was the only direct evidence of Douglas's involvement in the crime. *Id.* at 419.

In contrast to the *Douglas* case, Negrete did not remain silent during her testimony or cross-examination. She answered questions about the day of the murder, her grand jury testimony and various other matters. She remembered going to the grand jury and admitted to having given certain information during the grand jury proceedings. (Tr. at 222, 225-26, 229, 231-32). At trial, she changed her story about the night of the murder and testified that she lied to the grand jury. (Tr. at 273-74.) The Court in Douglas based its decision on the fact that the witness refused to answer at all. Douglas, 380 U.S. at 420 ("effective confrontation of [the witness] was possible only if [he]

affirmed the statement as his"). Here, Negrete did affirm some of the grand jury testimony as hers but claimed to have forgotten certain other portions of her testimony. Her memory lapse, feigned or real, did not result in a violation of Trejo's Sixth Amendment right of confrontation. *See United States v. DiCaro*, 772 F.2d 1314,1327 (7th Cir. 1985) (discussing *United States v. Payne*, 492 F.2d 449 (4th Cir. 1974), where no Confrontation Clause violation was found when a witness's prior written statement was admitted when the witness at trial "claimed to have forgotten both the giving of the statement and the facts contained within the statement").

Trejo focuses too much on Negrete's alleged failure to remember making certain statements to the grand jury. Her selective memory, though, is one factor considered by the trier of fact when assigning weight to her testimony. The right contained within the Confrontation Clause is not concerned with only the substance of the testimony. It is important that the fact-finder can observe the demeanor of the witness, when the witness is under cross-examination, is testifying under oath and is in the presence of the accused. *Delaware*, 474 U.S. at 20. There is value in "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether his is worthy of belief." *Douglas*, 380 U.S. at 419 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). The Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware*, 4,14 U.S. at 20. Even when the witness cannot recall providing facts in an affidavit or even appearing before a grand jury, admission of the affidavit and grand jury testimony as substantive evidence does not violate the Confrontation Clause. *United States v. Keeler*, 130 F.3d 297, 302 (7th Cir. 1997). In deciding *Keeler*, the Seventh Circuit looked to

United States v. Owens, 484 U.S. 554 (1988) and found that "the confrontation clause... [is] satisfied when the witness must look the accused in the eye in court." *Keeler*, 130 F.3d at 302. Negrete took the stand and answered questions regarding Trejo's involvement in the murder. Her failure to remember certain specifics of grand jury testimony and the admission of that testimony into evidence did not result in a violation of Trejo's Sixth Amendment right to confront the witnesses against him.

Conclusion

For the reasons set forth above, Trejo's section 2254 petition is denied and this case is dismissed.

ENTER:

/s/
UNITED STATES DISTRICT JUDGE

DATED: 2/24/03

FOURTH DIVISION

September 24, 1998

No. 1-97-2733

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 96-CR-12773

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE TREJO, Defendant-Appellant

HONORABLE THEMIS N. KARNEZIS, JUDGE PRESIDING.

ORDER

Defendant, Jose Trejo, and co-defendants, George Vazquez (Vazquez) and Agapito Villalobos (Villalobos), were charged with two counts of first degree murder. Following a bench trial, defendant was convicted of the murder of Danny Valencia. Co-defendants, Vazquez and Villalobos, were found not guilty.

Defendant was sentenced to 30 years in the Illinois Department of Corrections. On appeal defendant contends that: (1) the trial court erred in convicting defendant of first degree murder because the evidence was insufficient to sustain a conviction beyond a reasonable doubt and was so fundamentally weak that the conviction violates due process; (2) defendant was denied due process and his rights of confrontation and to present evidence when the trial court limited the cross-examination of Ricardo Gonzales; and (3) the trial court erred in admitting the statements of Mr. Garibay and Ms. Negrete as substantive evidence. For the

following reasons we affirm. The relevant facts are as follows.

In November 1995, both defendant and Villalobos were members of the Satan Disciples gang. Villalobos was the highest ranking Satan Disciples member, with the title of "King of the Satan Disciples." The victim, Danny Valencia, was the second highest ranking Satan Disciple. Defendant did not have a rank at this time. During the early morning hours of November 2, 1995, the victim was shot seven times in the face and body. In addition, the victim had bruises and abrasions on his right leg, nose, face, and shoulder. The victim died as a result of these wounds.

On November 1, 1995, the Satan Disciples held a meeting. Defendant, Villalobos, and the victim were in attendance. During the meeting Villalobos was collecting dues in order to buy guns for the gang. A gang member accused Villalobos of pocketing the money rather than purchasing guns. The victim agreed with this accusation. The members then voted to make the victim the king of the Satan Disciples if Villalobos did not buy guns for the gang within one month.

Patricia Negrete, also a member of the Satan Disciples gave a signed statement to the State's Attorney and testified before the grand jury. At trial, Negrete did not recall or denied much of the information that she had previously provided in her signed statement and before the grand jury. The trial court admitted Negrete's signed statement and grand jury testimony as substantive evidence. She stated that she had been at the Satan Disciples meeting on November 1, 1995. On November 2, 1995 at approximately 4:30 a.m., Negrete was standing in the 2300 block of South Leavitt waiting for a friend. Negrete had begun to walk toward her own house in the 2000 block of South Leavitt when she heard two gunshots. As she continued walking, Negrete heard three more gun shots.

Negrete ran back towards 23rd and Leavitt and eventually stopped in front of an alley. She saw Villalobos swinging his right arm down towards the ground as if he was hitting someone. She heard the victim scream you've already got me. Negrete recognized the victim's voice because she used to date him. At trial Negrete testified that she told the State's Attorney that she saw defendant in the alley with Villalobos on November 2, 1995.

Ricardo Gonzales, a Satan Disciples gang member, testified that on November 11, 1995, he went to the Taco Nazzos restaurant by himself. Gonzales sat in a booth next to defendant, co-defendant Vazquez, and an unidentified third person. Gonzales's back was to defendant's back. Gonzales overheard defendant and Vazquez discussing the victim's murder. Vazquez stated that Villalobos had killed the victim because the victim was giving information to the feds. Vazquez, defendant, and a third person had been waiting for the victim at Villalobos's house. When the victim arrived around 4:30 a.m. and got out of his car they all started shooting at him. The victim was yelling "don't shoot, don't shoot." Vazquez shot first. The others then shot the victim until "he had no face." Defendant said he was the last one to shoot. After shooting the victim, Vazquez said that the bullet proof vest did not save the victim this time. Vazquez and defendant were laughing and joking about the murder. A few days after hearing this conversation, Gonzales ran into defendant and Vazquez on the street. Vazquez told Gonzales that he better keep whatever he overheard to himself or else he would end up in an alley too. The statements of defendant and Vazquez were admitted into evidence against them, but not against co-defendant Villalobos. Gonzales was arrested for an unrelated weapons charge on November 18, 1995. After he was charged with possession of a weapon by a felon, Gonzales told police about the conversation he had overheard on November 11, 1995. Prior to testifying, Gonzales wrote a letter to the State's Attorney stating that he

did not want to testify and that his testimony would not be believed because he had made a deal with the detectives and another State's Attorney. Pursuant to this alleged deal, the charges against Gonzales would all be dropped in exchange for his signed statement against defendant. At trial Gonzales testified that there in fact was no deal. Gonzales lied about the alleged deal because he was frightened and did not want to testify. The charging officers involved in Gonzales's weapons charge failed to show up at the hearing on those charges and the charges against Gonzales were dropped.

Juan Garibay lived on the 2300 block of South Leavitt in November 1995. Garibay testified that he was awakened by several gunshots around 4:30 a.m. on November 2, 1995. He looked out his window, which faced the street, and saw two men between the ages of 20 and 25, running from the alley. Although the two men were running away from Garibay, one of them turned around for a few seconds and Garibay saw his face. Garibay later identified defendant in a photo line-up as looking like one of the men who was running from the alley after the gunshots. He later identified defendant in an in-person line-up. Garibay testified that he wears glasses for driving, but can see very well without them. He was not wearing his glasses on the morning of November 2, 1995, when he saw the two men running from the alley.

In his original statement, which was admitted as substantive evidence, Garibay stated that he had previously seen defendant around the neighborhood. Indeed, Garibay had seen defendant park his car on the sidewalk in front of Garibay's house a few months before the shooting. At trial Garibay did not recall defendant, previously parking his car in front of Garibay' s house.

Following the bench trial, the trial judge found defendant guilty of first degree murder and sentenced him to

30 years in the Illinois Department of Corrections. Defendant now appeals.

Defendant first contends that the evidence was insufficient to sustain a conviction beyond a reasonable doubt and was so fundamentally weak that the conviction violated due process. We disagree.

A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 478 N.E.2d 267 (1985). Our function upon review is not to retry the defendant, but to determine whether, after viewing all the evidence in the light most favorable to the prosecution "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *People v. Smith*, 215 Ill. App. 3d 1029, 576 N.E. 2d 186 (1991).

The evidence in this case shows that the defendant was seen in the alley standing with a co-defendant at the time of the shooting, was seen running in the alley shortly after the shooting, and was overheard discussing his participation and involvement in the murder.

Negrete testified that she heard several gunshots around 4:30 a.m. on November 2, 1995. She saw both defendant and co-defendant Villalobos in the alley. She saw Villalobos swinging his arm down towards the ground as if he was hitting someone. She heard the victim, whose voice she recognized, scream you've already got me.

Juan Garibay lived in a second floor apartment in the neighborhood where the shooting occurred. Garibay testified that he heard several gunshots around 4:30 a.m. on November 2, 1995. He looked out of his window and saw two men between the ages of 20 and 25 running in the alley.

One of the men turned around and Garibay was able to see his face for a few seconds. Garibay identified the defendant in both a photo line-up and in an in-person line-up.

Finally, Gonzales testified that he overheard a conversation between defendant and co-defendant Vazquez in which they each admitted their participation in the murder. During the conversation, defendant admitted that he shot the victim.

Defendant contends that because the trial court acquitted co-defendants Villalobos and Vazquez, even though they were similarly accused by each witness, he should also have been found not guilty. Defendant claims that his co-defendants were acquitted because the trial court found Negrete's and Gonzales's testimony to be incredible and unreliable. Furthermore, defendant contends that there was no other evidence against him to corroborate the testimony of Negrete and Gonzales. These arguments must fail.

The trial court never characterized either witness's testimony as unreliable. Rather, the trial judge described them both as "unwilling witnesses." Furthermore, the defendant and co-defendants were not tried on the same facts, thereby requiring similar verdicts. It is on this basis that *People v. Carter*, 19 Ill. App. 3d 21, 311 N.E. 2d 213 (1974) relied on by defendant, is distinguishable. Negrete was the only witness to connect co-defendant Villalobos to the crime. Gonzales was the only witness to connect co-defendant Vazquez to the crime. However, both Negrete and Gonzales connected defendant to the crime. Moreover, Garibay further implicated the defendant. The testimony of each witness was to some decree corroborated by the testimony of the other two witnesses. Clearly, the testimony of all three witnesses was sufficient to find the defendant guilty of first degree murder beyond a reasonable doubt.

Defendant also questions the credibility and reliability of each witness's testimony. We first note that the determination of the credibility of witnesses and the weight to be given their testimony is exclusively within the province of the trier of fact. *People v. Slim*, 127 Ill. 2d 302, 537 N.E.2d 317 (1989); *People v. Collins*, 106 Ill. 2d 237, 478 N.E.2d 267 (1985). We will not substitute our judgement for that of the trier of fact in matters of weight, credibility or conflicting evidence. *People v. Morales*, 281 Ill. App. 3d 695, 666 N.E.2d 839 (1996); *People v. Eppinger*, 293 Ill. App. 3d 306, 688 N.E.2d. 325 (1997).

We also note that this case involves a gang related shooting. All of the witnesses had been threatened in some way and were obviously afraid to testify against known gang members. Their fear was evident in their uncooperative and hostile manner at trial. The trial judge was in the best position to observe this behavior and see through the witness' attempts to distance themselves from their original statements and grand jury testimony.

We reject defendant's contention that Garibay's identification testimony was insufficient. The reliability of an identification is tested by the totality of the circumstances, including the witness's opportunity to view the perpetrator, the witness's degree of attention, the certainty and accuracy of the description, and the time elapsing between the crime and the identification. *People v. Eppinger*, 293 Ill. App. 3d 306, 688 N.E.2d 325 (1997); *People v. Manion*, 67 Ill. 2d 564, 367 N.E.2d 1313 (1977) .

Garibay saw the defendant's face for a few seconds. Moreover, he told police that he had seen the defendant around the neighborhood before. Garibay's signed statement indicated that he had seen the defendant park his car on the sidewalk in front of Garibay's house a few months before the shooting. Officer Sanchez corroborated these facts. Defendant was not a stranger to Garibay and

this enhanced the reliability of Garibay's identification. *See People v. Peck*, 358 Ill. 642, 193 N.E. 609 (1934). Garibay testified that he was awakened by loud gunshots. Certainly Garibay was alert after hearing gunshots that sounded like they were "right in the door steps." Garibay was not wearing his glasses when he saw defendant running in the alley. However, he testified that he sees very well without his glasses.

On November 14, 1995, just 12 days after the shooting, Garibay identified the defendant in a photo line-up. The next day he identified defendant in an in-person line-up. Garibay testified at trial that he had some doubts about the identification. However, he also testified that his wife and children had been threatened and that his daughter's car had been rammed and the windows smashed. The trial judge noted that Garibay was "certainly an unwilling witness" and "he clearly did not want to be in this courtroom." The threats to his family obviously colored Garibay's trial testimony. The trial judge saw through Garibay's attempts to distance himself from his original identification.

We also reject defendant's contention that Negrete's testimony was unreliable. Defendant points to the discrepancies between her trial testimony and her grand jury testimony and her written statement. It was obvious that Negrete was hostile and uncooperative at trial. The trial judge noted that she was an "unwilling witness." Negrete had been threatened. The trier of fact could rationally have believed that the discrepancies in her trial testimony were a result of her fear.

We similarly reject defendant's contention that Gonzales's testimony was not credible. Defendant argues that Gonzales's testimony was not credible because he had been arrested on November 18, 1995, for unlawful use of a weapon by a felon and those charges were later dismissed

allegedly as a result of his testimony in this case. Gonzales testified that there was no such deal. The trial judge heard all the testimony regarding Gonzales's possible motive to lie and in his discretion determined that Gonzales's testimony was credible.

Defendant also argues that Gonzales's testimony was not credible because he contradicted himself. Prior to trial Gonzales wrote a letter to the State's Attorney discussing an alleged deal he had made with another State's Attorney, in which all charges against him would be dropped in exchange for his testimony in this case. At trial Gonzales admitted that there was no such deal and that he had lied because he did not want to testify. He was afraid. He had been threatened by co-defendant Vazquez. The trial judge had the opportunity to hear this testimony and to observe Gonzales's demeanor. Discrepancies or conflicts in testimony affect only the weight to be given to the witness's testimony, and the trier of fact is free to accept or reject as much or as little as it sees fit of a witness's testimony. *People v. Porter*, 277 Ill. App. 3d 194, 660 N.E.2d 118 (1995). The trial judge heard all the testimony and accepted Gonzales's testimony regarding the conversation he overheard.

We find that when viewed in the light most favorable to the prosecution, this evidence is sufficient to sustain defendant's conviction for first degree murder beyond a reasonable doubt. The trial court did not err in convicting defendant.

Defendant next contends that he was denied his rights to confrontation and to present evidence for the defense when the trial court limited defendant's cross-examination of Ricardo Gonzales. Specifically, defendant contends that the trial court erred in excluding evidence that Gonzales struck his mother and evidence of Gonzales's belief that his testimony was his "get out of jail free" card.

The confrontation clause of the Sixth Amendment guarantees a defendant the right to cross-examine a witness against him for the purpose of showing the witness's bias, interest, or motive to testify falsely. *People v. Jefferson*, 260 Ill. App. 3d 895, 631 N.E.2d 1374 (1994). However, defendant's rights under the confrontation clause are not absolute. *People v. Jones*, 156 Ill. 2d 225, 620 N.E.2d 325 (1993). The scope and manner of cross-examination is within the sound discretion of the trial court and on review, we will not interfere unless there has been a clear abuse of that discretion. *Jefferson*, 260 Ill. App. 3d at 904, 631 N.E.2d at 1380-1381; *People v. Brown*, 243 Ill. App. 3d 1057, 614 N.E.2d 160 (1993); *People v. Bell*, 217 Ill. App. 3d 985, 577 N.E.2d 1228 (1991).

When reviewing a claim of denial of the right of confrontation, our focus is on the sufficiency of the information available to the trier of fact when it made its credibility determination. *Brown*, 243 Ill. App. 3d at 1063, 614 N.E.2d at 165. Our focus is not on the limitation placed on a cross-examination, but on whether the jury has been made aware of adequate facts to determine if the witness is worthy of belief. *People v. Harris*, 262 Ill. App. 3d 35, 634 N.E.2d 318 (1994); *People v. Collette*, 217 Ill. App. 3d 465, 577 N.E.2d 550 (1991). When it appears from the record as a whole that the jury has been made aware of adequate factors concerning relevant areas of impeachment of a witness, no constitutional confrontation question arises. *Harris*, 262 Ill. App. 3d at 46, 634 N.E.2d at 326; *Collette*, 217 Ill. App. 3d at 471, 577 N.E.2d at 554.

Upon review of the record in this case, we find that the judge was made aware of adequate factors concerning relevant areas of impeachment. Gonzales was questioned during cross-examination about his arrest and charge of unlawful use of a weapon by a felon. He admitted that he waited until he was arrested and so charged before telling the police about the November 11, 1995, conversation he

had overheard. Gonzales admitted that the case against him was subsequently dismissed and that he hoped he would be released from custody after he testified in this case. He also admitted that he had an altercation with his mother and that she filed a complaint against him for aggravated assault. He was also questioned extensively about the letter he wrote to the State's Attorney prior to trial that contained several untruths. "The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *People v. Jones*, 156 Ill. 2d 225, 620 N.E.2d 325 (1993); *People v. Harris*, 262 Ill. App. 3d 35, 634 N.E.2d 318 (1994). Defendant had ample opportunity to bring to the judge's attention that Gonzales had reasons to implicate defendant in this crime.

Furthermore, in each instance the witness answered no before the objection was sustained. Gonzales answered no to the question of whether he struck his mother and answered no to the question of whether he considered his testimony to be his "get out of jail free" card. Even if the objections had been overruled, Gonzales's negative answers would not support defendant's argument.

The cases relied on by defendant are distinguishable. In *Greene v. Wainwright*, 634 F.2d 272 (5th Cir. 1981), the defendant was barred from presenting any evidence, including cross-examination, regarding the witness's potential bias or motive. In the case sub judice defendant was allowed extensive cross-examination regarding Gonzales's possible motive, bias or expectations.

In *People v. Greer*, 293 Ill. App. 3d 861, 689 N.E.2d 134 (1997), the trial court allowed the defendant to elicit on cross-examination that the state had helped the witness move from his neighborhood. However, the trial court would not allow the defendant to elicit that the witness was behind in his real estate taxes and that he had wanted to

move for many years but had been financially unable to do so. The reviewing court noted that instead of giving the defendant the "widest latitude" the trial court interrupted the defense attorney's cross-examination and called it "ridiculous" in front of the jury. In the case sub judice there was no such restriction. Defendant was given the widest latitude in cross-examining Gonzales.

Finally, defendant argues that the excluded evidence, if admitted would have supported a "frame defense." However, defendant did not base his defense on the fact that he was framed.

Defendant had ample opportunity to thoroughly cross-examine Gonzales regarding his potential bias and motive to testify falsely. Therefore, the trial court did not abuse its discretion when it limited defendant's cross-examination of Gonzales.'

Finally, defendant contends that the trial court erred in admitting Garibay's and Negrete's statements as substantive evidence. We disagree.

Section 5/115-10.1 of the Code of Criminal Procedure (the Code) (725 ILCS 5/115-10.l(West 1994)) provides in pertinent part: "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement -

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness."

Garibay's original signed statement met the requirements of this statute. Garibay's testimony at trial was inconsistent with his original statement where he gave several unclear and evasive answers and where he testified that he had never seen the defendant before November 2, 1995, when he saw him running from the alley. He testified that he did not recall seeing defendant park outside his house on a prior occasion. Garibay's original statement described events that he personally observed and that were certainly within his personal knowledge. Moreover, his statement was signed. Garibay was subject to extensive cross-examination concerning his statement.

Negrete's prior statement and her grand jury testimony also met the requirements of section 5/225-10.1 of the Code (725 ILCS 5/115-10.1(West 1994)). Her testimony at trial was unquestionably inconsistent where she did not recall or denied almost all of the information she previously provided in her statement and her grand jury testimony. Most significantly, Negrete testified at trial that she did not see Villalobos in the alley on November 2, 1995; she did not hear the victim scream; and that she was in fact not even near the alley on November 2, 1995. This testimony was in direct conflict with her signed statement and her grand jury testimony. Her grand jury testimony was made under oath and her statement described events that she witnessed and that were within her personal knowledge. The statement was signed by Negrete on each page. Negrete was subject to extensive cross-examination regarding both her signed statement and her grand jury testimony.

The requirements of section 5/115-10.1 of the Code (725 ILCS 5/115-10.1(West 1994)) were met. Therefore, Garibay's prior statement, Negrete's prior statement, and her grand jury testimony were admissible as substantive evidence.

Defendant contends, however, that Garibay's statement was obtained in response to police harassment and that the statement is so lacking in reliability that its admission violates due process. At the very least, defendant maintains that he has a right to a hearing to have the trial court determine whether the statement is sufficiently reliable for the jury to consider it. In *People v. Morales*, 281 Ill. App. 3d 695, 666 N.E.2d 839 (1996), the court addressed whether the trial court needed' to consider constitutional factors prior to admitting a prior inconsistent statement. The defendant argued that an initial finding of reliability was required. The court disagreed, holding that "the Illinois legislature clearly intended the statute to be the only inquiry necessary in determining whether to admit prior inconsistent statements." 281 Ill. App. 3d at 703, 656 N.E.2d at 845. The court found that both a defendant's Sixth Amendment right to confrontation, and the due process consideration of preventing convictions where a reliable evidentiary basis is totally lacking, are fully addressed and protected when the requirements of the statute are met. The court went on to hold that a witness's claim of coercion does not necessarily render the admission of such a statement unconstitutional. Rather, a mixed question of law and fact arises. The court should first make certain that there is a sufficient evidentiary basis from which the trier of fact could find that the statements were made voluntarily. It is then for the trier of fact to determine the credibility of the witness's testimony of coercion and to determine whether the statements were in fact made voluntarily. The court found that the testimony of two State's Attorneys and some police officers that the witness's statement was made voluntarily provided a

sufficiently reliable basis for the admission of the prior statements.

Similarly, in the case sub judice, the testimony of A.S.A. Miller and Detective Munoz, that Garibay was never threatened or harassed into signing the statement, provided a sufficiently reliable basis for the admission of the prior statements. It was then for the trier of fact to assess the credibility of Garibay's trial testimony of coercion, which he did.

Defendant has waived review of his argument that the witness's prior statement was unreliable per se, whether or not it was "involuntary", by his failure to cite any authority to support this contention. *People v. Dinger*, 136 Ill. 2d 248, 554 N.E.2d 137S (1990). Defendant's alternative argument that he has "standing to move to exclude another person's statement where the other person's statement is involuntary and the product of egregious police conduct" is also waived as defendant failed to raise this issue in the trial court. *See People v. Enoch*, 122 Ill. 2d 176, 522 N.E.2d 1124 (1988).

We find that Garibay's and Negrete's statements were properly admitted pursuant to section 5/115-10.1 of the Code (725 ILCS 5/115-10 (West 1994)).

Accordingly, for the reasons set forth above, the judgement of the circuit court of Cook County is affirmed.

Affirmed.

McNAMARA, J., with SOUTH,. P.J. and HOFFMAN, J., concurring.

STATE OF ILLINOIS)
)
)
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS	)	No. 96-12773
	)	Charge: Murder
VS	)	
	)	Judge THEMIS N. KARNEZIS
JOSE TREJO (Impleaded)	)	March 13, 1997

Court convened pursuant to adjournment

PRESENT:

MS. ANITA ALVAREZ,
Assistant State's Attorney
appeared for the People,

MR. MICHAEL WALSH,
appeared for the Defendant

Pamela C. Taylor,
Official Court Reporter
2650 S. California - 4C02
(773) 890-6065

THE CLERK: People of the State of Illinois versus George Vazquez, Jose Trejo and Agapito Villalobos.

THE COURT: The case is here for my decision in this matter. Having heard all the arguments and testimony from both sides, both sides having rested and completing final arguments, just a few brief remarks.

We heard testimony from numerous witnesses in this matter and at least touch on a little bit of that.

The first witness we heard from was Mr. Acosta, who testified about his contacts with the victim in this case. Mr. Valencia, I believe it was the evening before the shooting and testified that he last saw him at about one o'clock in the morning on the second.

Mr. Rich, Ricardo Gonzales testified that he was an acquaintance, I think, of just about everyone, that on November 11th, 1995, he testified about being in a restaurant and overhearing conversations involving Mr. Trejo, Mr. Vazquez and a third person. Mr. Villalobos was not present for those conversations.

We indicated, I believe when we ruled that those conversations would be, we would consider them as to Mr. Trejo and Mr. Vazquez, we would specifically not consider them as to Mr. Villalobos.

He testified about comments made by both of the aforementioned two individuals, he also testified that on November 18th, 1995, he was arrested and charged with aggravated assault and unlawful use of a firearm by a felon, and that thereafter he in fact testified before the Grand Jury.

We would characterize, he also testified about correspondence that he mailed to Miss Alvarez indicating his desire not to be called as a witness in this case.

He further testified that he had no personal knowledge about the murder in this case and learned some

of the things about the murder from people in the neighborhood.

Lastly, he testified, at least my recollection is that he talked about whether there had been any, quote deals, closed quote, regarding the pending case that he had, which resulted from the arrest on November 18th.

Patricia Negretti testified and characterizing her as an unwilling witness is certainly an under statement but she was all of that. She testified before the Grand Jury, she spoke to an assistant state's attorney and signed a statement. This maybe an exaggeration, but, her testimony, testimony in this courtroom might be characterized as a lot of I don't knows, I don't remembers or I never said that, or I lied.

She testified as to -- she also talked about or we admitted her Grand Jury testimony and also her statement to the assistant state's attorney, statement was given to the assistant state's attorney on 11/22/95, Grand Jury testimony, 12/7/95, and we admitted that person to 1/15, and I can't recall the exact section number, but it's wherein we are allowed, under certain circumstances, to consider the testimony as substantive evidence, not just as impeachment.

We next heard from Officer Wright -- strike that. Detective Wright, who I believe was one of the first officers or at least the first detective on the scene, and he spoke about his observations at 2342 S. Leavitt when he arrived regarding bullet holes in the rear gate at the alley.

He testified as to Mr. Villalobos, I believe, I believe that Mr. Villalobos resided at or next door to that location.

He also testified just about the physical layout and about what he observed when he arrived, including but not limited to the location of the vehicle, which was parked in the alley.

The fact that he could not enter the rear of the location, but had to go to the, through the gangway next door and come around through the, through another entrance.

Officer Brasic testified about, and I can't remember whether that was in person or by stipulation, but essentially was about the recovery of certain bullets and metal fragments on the rear deck at the location in question.

The next witness was Mr. Garabee, I think we can also, the Court finds he was also clearly an unwilling witness. Mr. Garabee certainly didn't want to be in this courtroom. He testified that he lived across the street on Leavitt, that on the evening in question, he heard certain, he heard gunshots, he characterized them as coming from, sounding different, they did not all sound alike.

He said that he then looked out the window and observed two people, males, I believe, I don't know whether he said Spanish or Hispanic, leaving, running or moving in a quick manner from the west to the east and then they turned down an alley and headed north.

He, on November 14th, 1995, viewed some photographs, which were brought, I believe, to his home. He picked out one of those photographs, that was a photograph of Mr. Trejo, and I believe his testimony was that that looked like or may have been, or words to that effect, one of the men that he saw.

He indicated that he only got a good look -- only got a look at one of the men's faces and could only -- well, I'll leave it at that.

He spoke with an assistant state's attorney on December 5th, 1995. He told the assistant state's attorney what he had seen and also spoke about that person, the

person he saw being the same person, he believe it was the same person he had seen park a Bonneville on his sidewalk, on the sidewalk in front of his house. And the, his testimony was, looked like, seemed like, could have been, words to that effect .

His statement to the assistant state's attorney was given en December 5th, which essentially was, was pretty much the same as his initial statement to the police shortly after the incident and pretty much along the lines of his testimony in this courtroom with some of what I might respectfully refer to as some backtracking.

He also testified that he viewed a lineup and that he picked out Mr. Trejo in that lineup. Once again it looked like, could have been type testimony.

Assistant state's attorney Lawler testified as to her taking the statement from Mr. -- Ms. Negretti. Officer Sanchez testified that he is the officer who showed Mr. Garabee the photographs and Mr. Garabee picked out the photograph of Mr. Trejo and said that looked like the person that he saw running.

And was also the same person who had parked the car out in front of his house. It was pointed out that there was nothing about the car in his report.

He also testified about going to the 10th District and going through tickets, parking tickets, which were issued from the 10th District.

Detective Munoz testified about the lineup, about Mr. Garabee's identification and about the fact that he had gotten an arrest warrant for Mr. Villalobos and that he talked about: Mr. Villalobos being returned to Illinois from Texas.

That is certainly not the totality of the testimony, but those are some of the highlights and some of the things that we heard during this fairly lengthy bench trial.

Based upon the evidence we heard, as to Mr. George Vazquez, there will be a finding of not guilty, defendant discharged.

As to Mr. Jose Trejo, there will be a finding of guilty, bond revoked, pre-sentence investigation will be ordered.

As to Mr. Villalobos, there will be a finding of not guilty, defendant discharged.

As to those two individuals, Mr. Villalobos and Mr. Vazquez, quash and recall all warrants in this case.

As to Mr. Trejo, April, how about the 9th Mr. Walsh?

MR. WALSH: Just a moment, your Honor. That's fine, judge. That will be the order.

MS. ALVAREZ: Judge, we would ask Mr. Trejo all bonds be revoked.

THE COURT: Bond revoked.

MR. DOHERTY: May I be excused to go to Judge Thomas courtroom?

THE COURT: Yes.

MR. WALSH: Judge, there was a C.B.R. ordered in this case.

THE COURT: Mr. Trejo, do you wish the balance of your bond to go to your lawyer as part of his fee in this case?

THE DEFENDANT: Yes.

(Which were all the proceedings had until April 9, 1997 .)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

February 3, 1999

Hon. Jim Ryan
Attorney General, Criminal Appeals Div.
100 West Randolph St., 12th Floor
Chicago, IL 60601

No. 86501 - People State of Illinois, respondent, v. Jose Trejo, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1999.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS vs. JOSE TREJO

INDICTMENT NO. 96 CR-12773 O2

INDICTMENT FOR CONVICTION

CERTIFIED REPORT OF DISPOSITION The following disposition was rendered before the Honorable Judge JAMES, LINN, ON MARCH 5, 1999, POST-CONVICTION PETITION IS DENIED.

I hereby certify that the foregoing has been entered of record on the above captioned case.

Date: March 8, 1999

Clerk of the Circuit Court

/s/

AURELIA PUCINSKI THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 1-99-1408

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FIFTH DIVISION

February 2, 2001

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

JOSE TREJO,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

No. 96 CR 12773

Honorable James Linn, Judge Presiding.

ORDER

Defendant Jose Trejo (Trejo) and co-defendants George Vasquez and Agapito Villalobos were all charged with two counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) for the shooting death of Danny Valencia. After a bench trial, defendant was convicted and sentenced to thirty years imprisonment, but his co-defendants were found not-guilty. His conviction and sentence were affirmed by this court on direct appeal on September 24, 1998 (No. 1-97-2733). On February 9, 1999, defendant filed pro-se petition for post-conviction relief in the trial court alleging that he was denied his constitutional rights to effective assistance of counsel and due process of the law. On March

5, 1999, the trial court denied defendant's post-conviction petition without conducting an evidentiary hearing. Petitioner now appeals that ruling. For the reasons that follow, we affirm.

Defendant's first argument is that this court should review whether the trial court erred in admitting evidence of his alleged arrest and identification under the doctrine of fundamental fairness, as he did not raise this issue on direct review or in his post-conviction petition. Generally, any claim that could have been raised on direct appeal, but was not, is barred under the doctrine of waiver and cannot be raised in a petition for post-conviction relief. *People v. Pruitt*, 239 Ill. App. 3d 200, 203 (1992). However, defendant argues that this rule is not an absolute bar to procedurally defaulted claims and, where fundamental fairness is required, waiver will not be applied in post-conviction proceedings. *People v. Wright*, 189 Ill. 2d 1, 36-37 (1999) (Freeman, C.J., specially concurring), quoting *People v Owens*, 129 Ill. 2d 303, 317 (1989).

"'[T]o show that collateral review is required by fundamental fairness despite waiver of the error, a post-conviction petitioner must show cognizable "cause" for his failure to raise the error and "actual prejudice" flowing from the error. In order to show actual prejudice, a defendant must show that the error worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. *People v. Yates*, (1991), 223 Ill. App. 3d 110, 116, 584 N.E.2d 1059, 1063, citing *People v. Owens*, (1989), 129 Ill. 2d 303, 318, 544 N.E.2d 276, 282 *Pruitt*, 239 Ill. App. 3d at 204.

One example of cognizable cause for failure to raise an error on direct appeal is the ineffective assistance of appellate counsel. To establish a claim for ineffective assistance of counsel, Illinois courts adhere to the two-pronged test of *Strickland v. Washington*, 466 U.S. 668, 104

S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that defendant was prejudiced by counsel's deficient performance, i.e., but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). Likewise, appellate counsel is ineffective if his or her decision not to raise an issue is objectively unreasonable and a reasonable probability exists that the defendant would have been granted relief on appeal had these issues been raised. *People v. Salazar*, 162 Ill. 2d 513, 521 (1994). In *People v. Enis*, No. 86636 (November 22, 2000), our supreme court recently commented that:

> "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. [Citations.] There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. [Citation.] The failure to satisfy either the deficiency prong or the prejudice prong of the Strickland test precludes a finding of ineffective assistance of counsel." *Enis*, slip op. at 5.

Furthermore, in "[a]pplying the two pronged test, Illinois courts have dismissed and denied post-conviction petitions where the defendants did not establish prejudice." *People v. Hernandez*, 283 Ill. App. 3d 312, 317 (1996), citing *People v. Fernandez*, 222 Ill. App. 3d 80, 84 (1991); *People v. Jett*, 211 Ill. App. 3d 92, 98 (1991)." In other words, this court need not decide whether counsel's performance was constitutionally deficient where the defendant cannot establish that he suffered prejudice. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

Defendant argues that fundamental fairness should apply to his ineffective assistance of counsel claim where his attorney failed to present on direct appeal the issue of whether his alleged arrest and identification should have been suppressed at trial, and where the facts established a reasonable probability that he would have been awarded relief. In addition, he states, because his appellate counsel failed to complete the record on direct appeal, this court should look past the fact that his post-conviction petition does not raise this issue, and instead focus on the fact that he "was a prisoner who was required to not only determine but also explain for himself the constitutional errors that occurred at his trial."

"The petitioner is entitled to a hearing on his post-conviction claims only where the allegations of the petition, supported by the trial court record and accompanying affidavits, make a substantial showing of a violation of a constitutional right." *Enis*, slip op. at 4, citing *People v. Cloutier*, 191 Ill. 2d 392, 397 (2000); *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). The sufficiency of the allegations contained in a post-conviction proceeding are reviewed de novo. *See People v. Coleman*, 183 Ill. 2d 366, 387-89 (1998) (holding that the question is essentially a legal one subject to plenary review).

"Generally, a ruling on an initial post-conviction petition is res judicata with respect to all claims that were raised or could have been raised in the initial petition. *People v. Flores*, 153 Ill. 2d 264, 274 (1992). 'Further, any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. *Flores*, 153 Ill. 2d at 274; 725 ILCS 5/122-3 (West 1994)." *Wright*, 189 Ill. 2d at 12. "The doctrines of res judicata and waiver will be relaxed, however, in three situations: where fundamental fairness so requires, where the alleged waiver stems from the incompetence of appellate counsel, and where the facts relating to the claim do not appear on the face of the original

appellate record." *People v. Hobley*, 182 Ill. 2d 404, 428 (1998).

At first glance, both the fundamental fairness exception and the exception for an allegation of the ineffective assistance of appellate counsel seem applicable. However, given the manner in which defendant structures his argument regarding fundamental fairness, it is apparent that he intends to argue the ineffective assistance of his appellate counsel. To illustrate, with regard to the "cause" requirement of the fundamental fairness exception, defendant argues (1) his appellate attorney was deficient in not arguing that the trial court was incorrect in admitting evidence of the alleged arrest and identification and (2) that such a deficiency essentially "failed to complete the record on direct appeal," which thereby resulted in his own omission of the issue from his post-conviction petition. Because defendant intertwines these exceptions so closely, we analyze defendant's claim as an argument for the ineffective assistance of appellate counsel.

The Illinois Supreme Court recently stated in *People v. Simms*, 192 Ill. 2d 348 (2000),

> "A defendant is guaranteed the effective assistance of counsel at trial and at a death sentencing hearing. *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64, 80 L. Ed.2d 674, 692-93- (1984). A defendant is also guaranteed the effective assistance of counsel on direct appeal as of right (*Evitts v. Lucey*, 469 U.S. 387, 396-97, 105 S. Ct. 830, 836-37, 83 L. Ed.2d 821, 830-31 (1985)), and a claim of ineffective assistance of appellate counsel is cognizable under the Post-Conviction Hearing Act (*People v. Mack*, 167 Ill. 2d 525, 531 1995)). Accordingly, this court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver steins from incompetency

> of appellate counsel in failing to raise the issue on appeal. Mack. 167 Ill. 2d at 531-32: *People v. Guest*, 166 Ill. 2d 381. 390 (1995), *People v Caballero*, 126 Ill. 2d 248, 269-70 (1989)." *Simms*, 192 Ill. 2d at 361.

Defendant did not, however, raise the issue of ineffective assistance of appellate counsel regarding the alleged arrest and identification in his post-conviction petition; this issue was first raised in this appeal from the dismissal of his post-conviction petition without an evidentiary hearing. While a claim of ineffective assistance of appellate counsel in defendant's post-conviction petition would have been sufficient for this court to relax the waiver of this issue when it was not raised on direct appeal, it cannot operate to relax the waiver of this issue where it was not raised by defendant in his petition. *People v. Gully*, 243 Ill. App. 3d 853, 862 (1993). In other words, if defendant had asserted that the alleged waiver stemmed from ineffective assistance of appellate counsel prior to his post-conviction petition, waiver would not apply to his ability to pursue the claim in his post-conviction petition. However, since defendant has proceeded beyond that stage and failed to reference this issue in his post-conviction petition, section 122-3 of the Act mandates that he has effectively forfeited this issue by not advancing it the second time around (*see People v. Friebere*, 305 Ill. App. 3d 840, 850 (1999); *People v. Zambrano*, 266 Ill. App. 3d 856, 866 (1994), appeal allowed, vacated in part 159 Ill. 2d 579 (1995); *People v. French*, 210 El. App. 3d 681, 688-89(1991)).

In addition, our supreme court has long held that the "plain error" rule which permits a court on direct appeal to take notice of plain errors and defects affecting substantial rights which were not brought to the attention of the trial court may not be invoked under the Act. *People v. Owens*, 129 Ill. 2d 303, 316-17 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct 3294, Ill. L. Ed. 2d 802 (1989); *People v. Free*,

122 Ill. 2d 367, 377-78 (1988), cert. denied, 488 U.S. 872, 109 S. Ct. 190, 102 L. Ed. 2d 159 (1988).

However, even if we were to apply the cause and prejudice test of the fundamental fairness doctrine to the instant case, it is clear that defendant remains procedurally barred from bringing this ineffective assistance of appellate counsel claim. Even if defendant could establish cause for appellate counsel's failure to raise his claims earlier, he cannot establish prejudice resulting from appellate counsel's failure to do so. As the supreme court also stated in Simms:

> "A court uses the *Strickland* analysis also to test the adequacy of appellate counsel. *People v. Mahaffey*, 165 Ill. 2d 445, 458 (1995); *Caballero*, 126 III. 2d at 269-70. A defendant who contends that appellate counsel rendered ineffective assistance, e.g., by failing to argue a particular issue, must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the defendant. *People v. West*, 187 Ill.2d 418, 435 (1999) (and cases cited therein).

Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to retrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Easley*, No. 84418, slip op. at 13 (May 25, 2000); West, 187 Ill. 2d at 435. Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue (*Mack*, 167 Ill. 2d at 534), for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal (*Easley*, slip op. at 13; *West*, 187 Ill. 2d at 435; *Guest* 166 Dl. 2d at 390). *Simms*, 192 Ill. 2d at 362.

We, therefore, must determine whether defendant's underlying claim that the trial court erred in admitting

evidence of defendant's alleged arrest and Garibay's subsequent line-up identification would have been successful if raised on direct appeal.

Defendant's ineffective assistance claim is meritless. Prior to trial, defendant argued a motion to quash arrest and suppress identification. The trial court denied defendant's motion to quash, and found that he was not arrested on November 15, 1995. It stated:

> "First of all, let's deal with the was [defendant] under arrest at 5:30 in the morning on November 15, 1995.
>
> In order to determine that, we must view what an innocent person, I think that's the standard, what an innocent person, what he would be thinking about if that occurred to him or her.
>
> On that date, police go to [defendant's] house in the early morning hours and the knock and bang and [defendant] comes to the door and wants to know what the heck they want. They don't say too much. Just that they want to talk to him.
>
> [Defendant] say that eventually, 'just give me a second, come on in.' And then in his own words now agr ed to go with them. He is not – I choose to accept the testimony of the officers indicating that he was not in cuffs.
>
> I think it's also worthy to note whether the question just wasn't asked for some reason or what. I don't know, but there is not evidence that [defendant] was ever given the magic words sometimes referred to as his rights.
>
> He was - there is absolutely no indication that during this extended period of time we don't question that he was there for more than twelve hours.

> Apparently, there is no interrogation going on here. That is I would submit to you unusual at best.
>
> Therefore, there are some real strong indications in my mind that [defendant] was not under arrest on that date. And I so hold.
>
> If, in fact, he were under arrest, I think there is substantial argument that can be made that there was, in fact, sufficient probable cause. We choose not to reach that point because we choose to rule or find at that time that he was not under arrest: therefore, the motion to quash the arrest will be denied."

A reviewing court will overturn a trial court's ruling on a motion to quash arrest only where the trial court's ruling is manifestly erroneous. *People v Montgomery*, 302 Ill. App. 3d 1, 8 (1998); *People v. Melock*, 149 Ill. 2d 423, 432 (1992). This deferential standard of review applies where the suppression motion turns upon findings of feet and is grounded in the reality that the trial court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve any conflicts in the testimony. *People v. Gonzalez*, 184 Ill. 2d 402, 411 (1998). This means that the ruling will be reversed only if we find that the trial court's factual findings were arbitrary, unreasonable, and not based on the evidence. *People v. Nadermann*, 309 Ill. App. 3d 1016, 1020 (2000), citing *People v. Wells*, 182 Ill. 2d 471, 481 (1998). Upon review of the record, we find that the trial court's determination was not arbitrary and was based on the evidence. As such, defendant's claim had it been raised on appeal would most likely have faltered, thereby making appellate counsel's failure to raise the issue on direct appeal not ineffective. For this additional reason, defendant's argument on this issue fails.

Defendant's second argument is that his pro se petition stated the gist of a meritorious claim that his trial counsel was ineffective for failing to present facts that would have contradicted the identification of Trejo by the State's witness, Juan Garibay. As a result, defendant argues, we should reverse the trial court's decision to dismiss his post-conviction petition as meritless, and remand for an evidentiary hearing. Like his previous claims, Trejo did not assert this argument on direct appeal. According to *Pruitt*, any issues which could have been raised on direct appeal, but were not, are waived. *Pruitt*, 239 Ill. App. 3d at 203. This is most likely the reason the trial court rejected defendant's argument on this matter. However, also like his previous claims, he now asserts that the failure to raise this issue on direct appeal resulted from the ineffective assistance of appellate counsel. Defendant did not, however, raise the issue of ineffective assistance of appellate counsel regarding trial counsel's ineffectiveness in his post-conviction petition; this issue was also first raised in this appeal from the dismissal of his post-conviction petition without an evidentiary hearing.

As discussed regarding defendant's first claim, according to section 122-3 of the Act, defendant has waived the issue of ineffective assistance of appellate counsel by failing to raise it in his post-conviction petition. *See People v. Friebere*, 305 Ill. App. 3d 840, 850 (1999); *People v. Zambrano*, 266 Ill. App. 3d 856, 866 (1994), appeal allowed, vacated in part 159 Ill. 2d 579 (1995); *People v. French*, 210 Ill. App. 3d 681, 688-89 (1991).

However, even if this court were to consider this issue under principles of fundamental fairness, defendant's contention would still fail. As previously stated, "a defendant who contends that appellate counsel rendered ineffective assistance, e.g., by failing to argue a particular issue, must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the

defendant. *People v. West*, 187 Ill. 2d 418, 435 (1999) (and cases cited therein)." *People v. Simms*, 192 Ill. 2d at 362. Moreover, "[t]he evaluation of post-trial claims of ineffective assistance of counsel requires examination of the factual assertions underlying the claim." *People v. Hayes*, 229 Ill. App. 3d 55, 66 (1992). Consequently, in examining the prejudice prong of this claim, we must analyze the merits of defendant's underlying claim that trial counsel was ineffective for failing to present facts that would have contradicted Garibay's identification of Trejo.

Garibay testified that on the morning of November 2, 1995, he was awakened by a loud noise outside of his apartment. One of the people turned around for a couple of seconds so that Garibay could see his face. On November 14, 1995, the police showed Garibay a book of photographs in which he picked out Trejo's picture as someone who "looked like" the person running from the alley. He also identified Trejo in a line-up as the person previously identified from the photo, but testified to the police that Trejo "maybe looks like" the person running from the alley. Eventually, defendant claims that Garibay was "worn down by the police" and signed a statement in which he stated that the man he saw running from the alley was the same man he saw in June of 1995 park a Bonneville on the sidewalk. Garibay also stated that the police had ticketed the Bonneville parked on the sidewalk.

In his post-conviction petition, Trejo maintains that it was ineffective assistance for his trial counsel to have not attempted to ascertain the identity of the Bonneville owner. He reasons that, "[i]f he had, and/or presented evidence to the court that Trejo was not in fact the owner of the automobile, there would have been a clear basis to destroy Mr. Garibay's already indefinite 'identification' of Trejo, the strongest 'evidence' the State had against Trejo. In fact, the only other eyewitness to the shooting * * * did not identify Trejo as one of the men he saw running from the alley. And

* * * the only other evidence the State had in this homicide investigation was the convoluted testimony of Gonzalez and the exculpatory trial testimony of [Patricia] Negrete."

Initially, we note that defendant has not attached any affidavits which support his contention that he did not own the car. "The petitioner is entitled to a hearing on his post-conviction claims only where the allegations of the petition, supported by the trial court record and accompanying affidavits, make a substantial showing of a violation of a constitutional right." *Enis*, slip op. at 4; *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). If the petition cannot advance the gist of a meritorious constitutional claim or is not supported by affidavits and/or the record, the court is to dismiss the petition as frivolous and patently without merit. 725 ILCS 5/122-2.l(a)(2) (West 1998); *People v. Topps*, 309 Ill. App. 3d 813, 822 (1999). Without such an affidavit in the present case, therefore, we cannot determine the validity of defendant's claims; much less that they constitute prejudicial error.

However, even if we had such an affidavit, it is impossible to say that defendant has shown a reasonable probability that the outcome of his trial would have been different if this evidence had been presented. Defendant argues that this evidence could have "destroy[ed]" Garibay's identification of Trejo. Nevertheless, this evidence would neither exonerate the defendant nor diminish Garibay's prior identification of him. It would simply state that defendant does not own a Bonneville. Because defendant has not demonstrated that he was prejudiced by his counsel's failure to investigate and present this evidence, his appellate attorney's failure to brief this issue on direct appeal would not constitute ineffective assistance.

Defendant's last argument is that fundamental fairness demands that we consider the propriety of the trial court's admission of Patricia Negrete's grand jury testimony

as substantive evidence, where the doctrines of res judicata and waiver do not apply. He contends that his appellate counsel had failed to argue the issue on direct appeal, and that this court's previous determination only stated that Ms. Negrete's prior statements were given voluntarily. In his post-conviction petition and in the current appeal, defendant argues that section 115-10.1 of the Illinois Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 1998)) applies because she was not subject to meaningful cross-examination as to that prior testimony.

For the reasons previously discussed, according to section 122-3 of the Act, defendant has waived the issue of ineffective assistance of appellate counsel by failing to raise it in his post-conviction petition. However, even if we were to consider defendant's claim of ineffective appellate counsel, we hold that it would still fail because appellate counsel did argue this precise issue on direct appeal. In a previous Rule 23 Order, this court ruled:

"Negrete's prior statements and her grand jury testimony also met the requirements of section 5/115-10.1 of the Code. * * * Her testimony at trial was unquestionably inconsistent where she did not recall or denied almost ail of the information she previously provided in her statement and her grand jury testimony. Most significantly, Negrete testified at trial that she did not see [co-defendant] Villalobos in the alley on November 2, 1995; she did not bear the victim scream; and that she was in fact not even near the alley on November 2, 1995. This testimony was in direct conflict with her signed statement and her grand jury testimony. Her grand jury testimony was made under oath and her statement described events that she witnessed and were within her personal knowledge. The statement was signed by Negrete on each page. Negrete was subject to extensive cross-examination regarding both her signed statement and her grand jury testimony.

The requirements of section 5/115-10.1 of the Code * * * were met. Therefore, * * * Negrete's prior statement and her grand jury testimony were admissible as substantive evidence." Trejo, Rule 23 at 17 (September 24, 1998).

Consequently this court's previous findings as to this issue on direct appeal are res judicata on the present appeal. Here, Trejo attempts to couch his argument in the terms of an ineffective assistance of appellate counsel claim for a failure to argue an issue. "However, an issue is not preserved, for purposes of post-conviction relief, merely by framing h in the context of a constitutional claim." *People v. Davis*, 156 Ill. 2d 149, 158 (1993). It is clear that Trejo's appellate counsel explicitly argued this issue before this court, and as such, this argument should fail.

For the foregoing reasons, we affirm the order of the circuit court of Cook County dismissing defendant's post-conviction petition without an evidentiary hearing.

Affirmed.

GREIMAN, J., with QUINN, P.J., and REID, J., concurring.

SUPREME COURT OF ILLINOIS

CLERK OF THE COURT

SUPREME COURT BUILDING

SPRINGFIELD. ILLINOIS 62701 (217) 782-2035

June 29, 2001

Hon. Jim Ryan
Attorney General, Criminal Appeals Div.
100 West Randolph St., 12th Floor
Chicago, IL 60601

No. 91552 - People State of Illinois, respondent, v. Jose Trejo, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on July 23, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES, ex rel JOSE TREJO, Petitioner, v. JAMES SCHOMIG, Respondent

SEPTEMBER 10, 2003

No. 02 C 4387

Paul E. Plunkett, Senior Judge

The Court declines to issue a certificate of appealability to Trejo because he has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

United States Court of Appeals For the Seventh Circuit

December 29, 2003

No. 03-3563

Before Hon. ILANA DIAMOND ROVNER, Circuit Judge

JOSE TREJO, Petitioner-Appellant, v.

STEPHEN MOTE, Respondent-Appellee

No. 02 C 4387

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, Paul E. Plunkett, Judge.

ORDER

Jose Trejo has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find that Trejo has made a substantial showing of the denial of a constitutional right as to whether his conviction was supported by sufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307 (1979); 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is GRANTED. Briefing shall proceed as follows:

1. Trejo's opening brief and required short appendix shall be filed on or before January 26, 2004.

2. Respondent's response shall be filed by February 17, 2004.

3. Trejo's reply, if any, shall be filed by March 2, 2004.

Note: Circuit Rule 31(e) (amended Dec. 1, 2001) requires that counsel tender a digital copy of a brief, from cover to conclusion, at the time the paper copies are tendered for riling. The file must be a text based PDF (portable document format), which contains the entire brief from cover to conclusion. Graphic based scanned PDF images do not comply with this rule and will not be accepted by the clerk.

Rule 26(c), Fed. R. App. P., which allows three additional days after service by mail, does not apply when the due dates for briefs are specifically set by order of this court. All briefs are due by the dates ordered.

United States Court of Appeals For the Seventh Circuit

September 16, 2004

No. 03-3563

Before Hon. ILANA DIAMOND ROVNER, Circuit Judge

JOSE TREJO, Petitioner-Appellant, v.

DONALD HULICK, Warden, Hill Correctional Center, Respondent-Appellee

No. 02 C 4387

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, Paul E. Plunkett, Judge.

ORDER

On September 2, 2004, petitioner-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

* Hon. Joel M. Flaum did not participate in the consideration of the petition.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

CASE TITLE: USA ex rel JOSE TREJO vs. JAMES SCHOMIG

CASE NUMBER: 02 C 4387, Judge Paul E. Plunkett

DATE: 6/18/2003

MEMORANDUM OPINION AND ORDER: Petitioner Jose Trejo's Rule 59 motion for reconsideration is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES, ex rel JOSE TREJO, Petitioner, v. JAMES SCHOMIG, Respondent

JUN 20, 2003

No. 02 C 4387

Paul E. Plunkett, Senior Judge

MEMORANDUM OPINION AND ORDER

This matter is before the Court on petitioner's Federal Rule of Civil Procedure ("Rule") 59 motion for reconsideration. For the following reasons, petitioner's motion is denied.

Discussion

Petitioner previously filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing three constitutional violations as grounds for relief. We denied his petition on all grounds. Petitioner has filed this motion for reconsideration, believing that we have misapprehended his first and second constitutional claims.

Legal Standard

A motion to reconsider is appropriate when the facts or law on which the decision was based have changed or when "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v.*

Rochester Cheese Sales, Inc., 906 F.2d 1185,1191 (7th Cir. 1990).

1. Procedural history and background are set forth in our February 24, 2003 Opinion.

A motion to reconsider is not an opportunity for parties to rehash old arguments or raise new arguments that could have previously been offered. *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996).

Petitioner's Claims

Petitioner's first claim is that his conviction rests on insufficient evidence. We found previously that the state court's application of the Jackson standard was "within the bounds of reasonableness" (as required by *Gomez v. Acevedo*, 106 F.3d 192, 200-201 (7th Cir. 1996)) and respected its decision. *See United States ex rel. Trejo v. Schomig*, 2003 WL 548364, at *3 (N.D. III. Feb. 25,2003). In this motion for reconsideration, petitioner makes the same arguments as in his habeas petition and we believe they have already been adequately addressed.

Petitioner's second claim is that his Fourth Amendment rights were violated because he was arrested without probable cause. Again, petitioner restates his previous arguments, albeit downplaying one aspect of his argument and focusing more fully on another. A motion for reconsideration is not the appropriate vehicle to expand on arguments previously made. Although our decision remains the same, we address petitioner's Fourth Amendment claim briefly for the sake of clarity.

During petitioner's criminal proceedings, his trial counsel moved to quash his arrest. After an evidentiary hearing at which petitioner testified, the trial court denied

the motion. Appellate counsel failed to raise the improper arrest issue on appeal and apparently did not obtain the transcripts from the motion to quash proceedings.

Petitioner did not raise his Fourth Amendment claim in his pro se post-conviction petition to the state, an omission he attributes to ineffective assistance of appellate counsel. But petitioner did not raise an ineffective assistance of appellate counsel claim in his post-conviction petition either. We found that petitioner procedurally defaulted both of these claims and could not establish adequate cause to excuse the default. *See Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir. 1991).

Petitioner offers two "causes" to excuse the procedural default of his claims: (1) his pro se status at the time he filed his post-conviction petition with the state and (2) his appellate counsel's substandard performance. It is this second cause which petitioner now fleshes out. According to petitioner, appellate counsel's performance was deficient because he (appellate counsel) failed to order the transcript of the hearing on the motion to quash petitioner's arrest. That transcript, petitioner says, would have alerted him to the existence of both his Fourth Amendment and his ineffective assistance of appellate counsel claims. But the transcript was not among the records forwarded to petitioner by his appellate counsel. Thus, petitioner says, he prepared his pro se state post-conviction petition unaware that those claims existed.

To the extent petitioner is advancing an ineffective assistance of counsel claim with respect to the preparation of his post-conviction petition, petitioner's claim is factually and legally deficient. Factually, the counsel petitioner complains of was petitioner's appellate counsel; petitioner's post-conviction petition was prepared pro se. Legally, there is no right to counsel in post-conviction proceedings. *See United States ex rel. Galvan v. McVicar*, 2000 WL 1780351,

at *4 (N.D. Ill. Dec. 4, 2000) (citing *Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996)).

In essence, petitioner argues that his appellate counsel's failure to order the transcript prevented him from timely raising his claims. We disagree. Petitioner has been aware of the existence of his Fourth Amendment claim since the beginning of the criminal proceedings against him. Petitioner knew the circumstances of his arrest and, having attended the hearing on the motion to quash, the trial court's reasons for deeming it constitutional. Moreover, he knew, or should have known, from the appellate court's opinion in his case that his appellate counsel failed to raise the Fourth Amendment issue on appeal. In short, though the transcript of the hearing on the motion to quash might have helped petitioner frame his Fourth Amendment and ineffective assistance claims, its absence in no way prevented him from raising those claims in his post-conviction petition.

Conclusion

Petitioner has failed to establish any of the grounds for granting a motion to reconsider pursuant to Rule 59. Petitioner's motion is denied.

ENTER:

/s/
UNITED STATES
DISTRICT JUDGE

DATED: 6/18/03

ORDER

IN THE APPELLATE COURT, STATE FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE TREJO, Defendant-Appellant.

No. 1-99-1408

ORDER

This cause coming on to be heard on Defendant-Appellant's, Petition for Rehearing and the Court being fully advised in the premises;

Justice

IT IS HEREBY ORDERED that the Petition for Rehearing is hereby denied.

SEE DISSENT ATTACHED TO THIS ORDER.

ORDER ENTERED

APR. 12, 2001 APPELLATE COURT, FIRST DISTRICT

JUSTICE REID, dissenting:

I dissent. This case presents a unique factual posture. By failing to order the transcripts of proceedings relating to the hearing on the motion to quash until after the denial of Trejo's post conviction petition, his counsel's representation clearly fell below the objective standard of reasonableness described in *Strickland v. Washington*, 466 U.S. 668, 697 (1984). It is incompetence per se to be unprepared by not only failing to review the records of a case but to fail to even acquire them at all.

The Post Conviction Hearing provisions under the Code of Criminal Procedure of 1963 provide a remedy to criminal defendants who claim that substantial violations of constitutional rights occurred at their trial. *People v. Britz*, 174 Ill. 2d 163,174 (1996). Chief among these rights is the guarantee of effective assistance of counsel at trial. *People v. Simms*, 192 Ill. 2d 348, 361 (2000). A defendant is also guaranteed the effective assistance of counsel on direct appeal as of right. Simms. 192 Ill. 2d at 361, citing *Evitts v. Lucey*, 469 U. S. 387, 396-97 (1985). Claims of ineffective assistance of appellate counsel are cognizable under the Post Conviction Hearing Act. *People v. Mack*, 167 Ill. 2d 525, 531 (1995). The Illinois Supreme Court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of the appellate counsel in failing to raise the issue on appeal. *Simms*, 192 Ill. 2d at 361, citing *Mack*, 167 Ill. 2d at 531-32.

In the case at bar, the issue missed by the appellate counsel was never put into writing anywhere which Trejo, a pro se litigant, would have had the opportunity to see. Though issues not raised on appeal are generally waived, that waiver is not an absolute bar to procedurally defaulted claims where fundamental fairness so requires. *People v. Wright*, 189 Ill. 2d 1 (1999).

Trejo's ineffective assistance of counsel claim should neither be treated as res judicata nor waived. "True the errors which underlie petitioner's current post conviction claims of ineffective assistance could have been raised in the prior post-trial proceedings. However, it is the failure to raise those claimed errors which forms the basis of defendant's ineffectiveness claim." *People v, Flores*, 153 Ill. 2d 264, 283 (1992). The Supreme Court in Flores concluded that it is "unreasonable to expect the counsel below to raise and argue his own incompetency." *Flores*, 153 Ill. 2d at 283.

The issues raised by Trejo, or more specifically those which would have been raised by Trejo if he had effective counsel, are not jurisdictional. He is now represented by effective counsel, who should be allowed to amend the appropriate pleadings and have that amendment relate back so as to comport with our notions of fundamental fairness. Trejo was unaware, at the time he drafted his pro se petition that he had a claim for ineffective assistance of counsel. There is no objective identification of the counsel's deficiencies which would have reasonably placed Trejo on notice of his claim. This explains why he left the ineffective assistance claim out of his petition. Failure to perfect an appeal can constitute ineffective assistance of counsel. *People v. Hernandez*, 283 Ill. App. 3d 312,317 (1996). "[A] criminal defendant must, at some point, be afforded the equivalent of direct review and an appellate advocate; a court cannot deny a defendant an attorney assisted appeal by examining the record and determining that defendant would not have succeeded on appeal in any event." *People v. Moore*, 133 Ill. 2d 331, 339 (1990), citing *Penson v. Ohio*, 488 U.S. 75, 86 (1988).

The issue in this case is so straightforward as to be deceptive in its simplicity. Trejo's prior counsel was ineffective, per se. Fundamental to our concept of ordered liberty is the notion that, before we lock you away, our judicial system will do everything to ensure that defendants are given a fair trial. Just as one cannot build a house on a weak foundation, neither can one build a case on ineffective assistance of counsel. It is antithetical to everything for which we stand since anything which flows from the ineffective assistance is similarly tainted. Notwithstanding the conclusions reached by the majority's view of the facts, this is a case of an attorney who never ordered nor reviewed crucial records before dealing with the appeal. It is that ineffective assistance which casts a heavy shadow on these proceedings, making the majority's lengthy recitation and interpretation of the facts of this case largely irrelevant and

arguably misleading. Because of the laek of competence on the part of the appellate counsel and the fact that his errors were not apparent to Trejo as he prepared his pro se petition, fundamental fairness and substantial justice should cause this court to allow him to be given a chance to retroactively amend his petition. If, after amending his petition, he then fails to persuade the court, so be it. It is for that reason that I must respectfully dissent from the majority.

U.S. Constitution Amendment 14

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in

insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 2254. State custody; remedies in Federal courts:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, vs. JOSE TREJO, Defendant, 96 CR 12773

REPORT OF PROCEEDINGS had at the hearing of the above-entitled matter, on the 4th day of March, 1997, before the Honorable THEMIS N. KARNEZIS, Judge of said court.

* * *

RICARDO GONZALEZ

called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

* * *

Q:... When you got to that restaurant and sat down in that restaurant, did you see anybody in that restaurant that you knew?

A: Yes, I did.

Q: Who did you see?

A: Joe Trejo and George Vasquez.

Q: And when you saw Mr. Trejo, and Mr. Vazquez were they with anybody?

A: Yes.

Q: And who were they with?

A: I don't know.

* * *

Q: And while you were in that restaurant sitting in the booth directly next to the two defendants, did you hear anything?

A: Yes, I did.

Q: And what did you hear?

A: They were talking about the murder, Gizmo's murder.

* * *

Q: And when you heard his voice, what did you hear Mr. Vazquez, Rocky, say?

A: He said that the Old Man had them hit Gizmo.

* * *

Q: Did Mr. Vazquez say specifically – what did he say about the shooting?

A: That when he came up, they came out and he shot first. They were using a .357, .38, and a .22 and he shot first and they all came to him and started shooting and shot him until he had no face.

Q: And when Mr. Vazquez said that he shot first and they all started shooting and shot Mr. Valencia until he had no face, did you hear any one else say anything else?

A: Joe Trejo said he was the last one to shoot. He shot him with the .22.

* * *

Q: And did you see Mr. George Vazquez and Jose Trejo again after you had seen them in the restaurant?

A: Yes.

Q: When was that?

A: Few days later.

* * *

Q: What happened when you saw those two defendants?

A: They told me whatever I knew or heard, keep it to myself or I will be found in an alley, too.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, vs. JOSE TREJO, Defendant, 96 CR 12773

REPORT OF PROCEEDINGS had at the hearing of the above-entitled matter, on the 5th day of March, 1997, before the Honorable THEMIS N. KARNEZIS, Judge of said court.

* * *

PATRICIA NEGRETE, called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q Would you state your full name for the record please and spell your name?

A Patricia Negrete, N-e-g-r-e-t-e.

Q How old are you, Ms. Negrete?

* * *

Q. Do you belong to any street gang?

A. Yes, I did.

Q. What street gang?

A. Satan Disciples.

Q. Do you still belong to that street gang?

A. No.

* * *

Q Did you have a nickname in the gang?

A Yeah.

Q What was your nickname?

A Psycho.

Q Also Psycho D?

A Yeah.

* * *

Q Who were the ranking members of the gang that were male at that time?

A All that I know was Aggie.

Q Aggie. And as far as you know, there was no one beneath him?

A Correct.

Q Do you remember going to the grand jury back in December of 1995 and having them ask you questions about the gang and the gang rank?

A Somewhat, yeah.

Q Okay. When you were under oath in the grand jury back on December 7 of 1995, were you asked this question and did you give this answer: "Question: Now, who is second highest ranking member? Answer: Gizmo." Were you asked that question and did you give that answer?

A I don't remember.

Q You don't remember. Well, you were only talking about the Satan Disciple street gang at that time, right, when you were in the grand jury?

A I don't remember.

Q You don't remember. Were you asked this question and did you give this answer in reference to Gizmo. "Question: Was he present at the meeting?

Answer: Yes, he was."

Were you asked that question and did you give that answer?

A I don't remember.

Q You have to keep your voice up because you are mumbling. I can hardly hear you?

A I don't remember.

Q Were you asked this question and did you give this answer in reference to Gizmo. "Question: What is his rank?"

"Answer: Second seat."

"Question: Second seat? Answer: Second in command."

Were you asked those questions and did you give those answers?

A I don't remember.

Q Didn't you just say a few moments ago in this very courtroom when I asked you those questions that you

did give those answers just about five minutes ago?

A No.

Q I am sorry?

A No.

Q So you don't remember what happened only five minutes ago?

A I don't remember answering those questions

Q. Five minutes ago your answers to those questions and answers were yes they were asked of you and these were your answers, is that correct?

A They were asked of me.

Q And those were your answers, isn't that correct?

A I didn't answer those answers.

Q Your testimony is under oath just five minutes ago, your answer to that question is yes I was asked those questions but no I didn't give those answers; is that your testimony?

A Correct.

Q Do you have any problem with your mind, Ms. Negrete?

A. No.

Q. You don't have any mental deficit, do you?

A: No.

* * *

A: Do you?

* * *

Q. You are not retarded or anything, are you?

A I don't know. Are you?

Q My question was are you retarded or anything like that?

A No.

Q As far as you know, there is no learning problem that you have, is there, Ms. Negrete?

A Not that I know of.

Q Were you asked this question and did you give this answer in the grand jury. "Question: Were both Gizmo and Aggie present at that meeting?

Answer: "Yes."

A I don't remember.

Q Ms. Negrete, before we go any further, tell us what you do remember about the grand jury.

A. Nothing.

Q. Nothing at all?

A. No.

Q. Do you remember going to the grand jury?

A. That is all.

Q. Okay. Do you remember walking in the room?

A. Yeah.

Q. Then what do you remember after that after getting sworn in like you said you were before?

A They asked me my name, where I lived, what I was, and that is all.

* * *

Q Do you recall about 4:30 in the American on November 2, 1995?

A A little, yeah.

Q Where were you at that time?

A I was on 23rd and Leavit.

* * *

Q And who were you there with?

A Me, my friend Maria and my cousin, Charlie.

Q What were you doing at 23rd and Leavit about 4:30 in the morning November 2, 1995?

A Waiting for my cousin Charlie's friend also to come home.

Q Were you waiting on the corner?

A I was waiting in front of -- waiting next door neighbor's house because the house that the guy lived in didn't have nowhere to sit so we sat next door.

Q So you were waiting at a next door neighbor's house. Whose house was this next door to?

A The closest person I know was Aggie.

Q The house that you were at was next door to Aggie's house?

A Yeah.

Q Okay. Where did Aggie live then?

A On 23rd and Leavit.

* * *

Q So you were next to a house that was on 23rd and Leavit?

A Yes.

Q And while you were at this house at 4:30 in the morning, you were with Charlie and Shorty D, right?

A Correct.

Q Okay. And when you were at that location at 4:30 in the morning, what happened?

A. Nothing.

Q. What did you do?

A. Just sat there and waited for him to come.

Q. You sat there and waited for who to come?

A. Oso.

* * *

Q You were waiting for a person named Oso to come?

A Yes.

Q Were you standing there or going anywhere at the time?

A We were just sitting there waiting.

Q Were you on your way home?

A Later on, yeah.

Q And when you were just sitting there about 4:30 in the morning, you say nothing unusual happened?

A A car pulled up with a couple of guys in it and they just asked us who we were and what we were and we told them.

* * *

Q Did anything unusual happen after that?

A No.

Q How about between 4:30 and quarter to 5:00, anything unusual happen other than a car pulling up?

A No.

Q You didn't hear anything?

A No.

Q Where did Oso live back then?

A He lived on 23rd and Leavit.

Q So you were in front of his house, is that right?

A Yes.

Q And where did Aggie live in relation to Oso's house?

A Right there, two houses down.

Q Two houses down. And when you were in front of Oso's house at 4:30 in the morning, the state's attorney and the grand jury asked you some questions about that, is that right?

A Correct.

Q And were you asked these questions and did you give these answers. "Question: Now, at some point did you leave Oso's house? Answer: We were just about to go home."

"Question: When you were just about to go home, was that at approximately 4:30 in the morning?

Answer: Yes, it was."

"Question: Did you see anything at that time? Answer: A black car pulled up and asked us if we were S.D and we said yes. And then we asked them if they were and they told us yeah. Then they told us we were not supposed to be there because the police didn't want us there."

"Question: How many people were in the car?

Answer: There were four."

"Question: How many were males of those

four? "Answer: Two."

"Question: What did you do? What happened after the individuals in the car made those statements?

"Answer: We just told them we would stay sitting there. We would tell the police we lived there."

Were you asked those questions and did you give those answers?

A. Yes.

Q. You remember those questions, is that right?

A. Yeah.

Q. You remember those answers, is that right?

A. Yeah.

Q. Is there something that makes you remember that and not remember anything about the gang meeting?

A Because I was there sitting I mean. We were there long enough to remember.

Q So you remember those questions because you were sitting outside and you don't remember because you were sitting inside with the gang; is that the distinction?

A I guess.

Q You guess. Were you asked these questions and did you give these answers. "Question: What did you do? What happened after these individuals in the car made those

statements? "Answer: We just told them we would stay sitting there. We would tell the police we lived there."

"Question: Then what happened? "Answer: Then they left and we started walking home."

"Question: As you were walking home, what happened? Answer: I heard two gunshots and me and my cousin turned around and started looking around to see if anybody was around us."

Were you asked those questions and did you give those answers?

A Yes.

Q So you did hear gunshots?

A No. But that is what I said.

Q Okay. So your testimony is under oath at the grand jury you answered those questions that way but you actually didn't hear gunshots?

A Correct.

Q So you lied to the grand jury; is that your testimony?

A Yes.

Q Were you asked these questions and did you give these answers. "Question: You caught up with your cousin? Answer: Yes."

"Question: Who is your cousin? Answer: Charlie."

"Question: Do you know Charlie's last name?

Answer: Negrete."

"Question: Was anyone else with you?

Answer: One of my girls, Shorty D."

"Question: Do you know her name? Answer: Maria."

Were you asked those questions and did you give those answers?

A Yeah.

Q I am sorry?

A Yes.

Q Were you asked these questions and answers.

"Question: Now, what happened after you heard those two gunshots? Answer: We looked around. We didn't see nobody shooting so we just kept on walking."

"Question: As you were walking, did you hear anything else? Answer: I heard three more gunshots."

Were you asked those questions and did you give those answers?

A Yes.

Q Did you hear three more gunshots?

A No.

Q Were you asked these questions and did you give these answers. "Question: What did you do after you heard these three additional gunshots? Answer: I told my

girl Shorty D to take my cousin home at 20th and Leavit and I started walking back to Oso's house."

"Question: When you were walking back toward Oso's house, is that the same direction of Aggie's house? Answer: Yes, it is.

"Question: As you were walking back, did anything happen or did you notice anything? Answer: I seen the same black car that stopped earlier speeding like a block down from us. It just sped and left quickly."

"Question: After that car left, what did you do? Answer: I talked towards the alley and I stopped like in the middle before I went to the alley. I didn't hear nothing. Then I heard somebody say you did this you bitch. You did this."

Were you asked those questions and did you give those answers?

A Yes.

Q On November 2, 1995 sometime around 4:30 in the morning, did there ever come a time when you were walking back alone towards Oso's house?

A What do you mean when I was walking back towards his house.

Q Towards his house, yes, while you were alone.

.A No.

Q Did you ever walk towards an alley, Ms. Negrete?

A No.

Q You never walked toward an alley on November 2, 1995?

A No.

Q Were you asked these questions and did you give these answers. And this follows the last series.

"Question: Then what did you do? Answer: That is when I walked toward the alley and I peeked. I knew if I stayed peeking they would have seen me so I bent down like I was trying to tie my shoelaces."

Did you answer that question in this manner in front of the grand jury?

A Yes.

Q "Question: When you were bending down pretending to tie your shoelaces, what did you do?

Answer: I turned and I seen what was going on."

"Question: Where were you looking? Answer:

I was looking towards Aggie's house."

"Question: When you looked towards Aggie's house, did you see anything? Answer: I seen Aggie bending over on somebody."

Were you asked those questions and did you give those answers?

A Yes.

Q "Question: Where was Aggie when you saw him bending over? Answer: Behind his house."

"Question: And what did you see? Answer: I seen Lucy come out of Aggie's house and give Aggie something and she said to hurry up."

Were you asked those questions and did you give those answers?

A Yes.

Q Do you know a person by the name of Lucy?

A Yes.

Q Who is Lucy?

A She is one of my friends, Cindy's friend.

Q She is one of your friends and whose friend?

A My friend Cindy knows her. They are friends.

Q Your friend knows Lucy?

A Yes.

Q Does Lucy have a relationship with Aggie as far as you know?

A Yes.

Q What is the relationship?

A I don't know. They are just together.

Q Like boyfriend and girlfriend?

A Yeah.

Q They were living together at the time as far as you know?

A I think.

Q Living in that house there as far as you know?

A. From what I know.

Q. I am sorry?

A. I don't know.

Q. You don't know. Were you asked this question 22 and give these answers. "Question: Who is Lucy?

Answer: Lucy is Aggie's girlfriend."

"Question: Did you see what Aggie did? Did Aggie appear like he received something from Lucy?

Answer: Yes."

"Question: Did you see what he did after he got something from Lucy? Answer: He kneeled on top of the person and started swinging."

"Question: What happened? What was he doing if you could tell? Answer: He was swinging on the person he was on top of."

Did you give those answers to those questions in front of the grand jury?

A Yes.

Q Were you asked these question and did you give these answers. "Question: What happened next?

"Answer: Then I didn't see no more. I stood up and I was walking quickly. I turned and I looked to see if I could get a better sight to see who was on the floor.

Aggie turned around and he looked toward me and I started walking even more faster because he seen me. I heard Gizmo say there, you got me already. You got me."

Did you answer that question and in that manner?

A Yes.

Q Were you able to recognize Gizmo's voice back in November of 1995, Ms. Negrete?

A If I heard it now?

Q No. Back in November of 1995 on November 2 if you would have heard Gizmo's voice, would you be able to recognize it?

A Yeah.

Q Were you asked these questions and did you give these answers. "Question: You heard who say that?

Answer: Gizmo."

"Question: How did you recognize Gizmo's voice? Answer: I used to go out with him."

Were you asked those questions and did you give those answers?

A No.

Q Did you used to go out with a person named Gizmo, Ms. Negrete?

A No.

Q Did you tell the grand jury you used to go out with a person named Gizmo?

A No.

Q Were you asked these questions and did you give these answers. "Question: What did you do then?

Answer: I ran home."

"Question: How much time was between the time you heard the shot and the time you saw Aggie outside his house? Answer: Like two or three minutes."

Did you answer these questions in that manner?

A. Correct.

Q. Sorry?

A. Yes.

Q Did you answer this question in this manner.

"Question: Approximately how far were you from Aggie's house when you saw him outside? Answer: A block down.

We were barely walking toward the end of the next street."

Did you answer that question in that manner?

A Yes.

Q And these questions. "Question: You indicated that you saw Aggie swing at someone on the ground? Answer: Yes."

"Question: When you saw that, how many houses were you away from Aggie? Answer: Two or three houses."

Did you answer those questions in that manner?

A Yes.

* * *

"Question: What street gang does Rocky belong to? "Answer: Satan Disciples."

"Question: Does Rocky have rank in the street gang? Answer: Not that I know of."

Were you asked those questions and did you give those answers?

A I was asked questions but didn't give those answers.

Q I'm sorry?

A I was asked those questions but did not give that answer.

Q What answers did you give?

A I said I didn't know him because I don't.

Q Ms. Negrete, when you were out on the street after being in front of Oso's house at 4:30 in the morning or shortly after 4:30 in the morning on November 2, 1995, did you ever see Aqapito Villalobos outside?

A. No.

Q. Your answer is?

A. No.

Q. Did you tell the state's attorney with the detectives and eventually have the state's attorney write down in summary this in your statement, that you kept walking referring to the alley and then peeked southbound down the alley. "She states she saw two garbage cans knocked down on the ground and Aggie standing next to the garbage can swinging his right arm down toward the ground as if he was hitting someone."

"She states that he did this three times but she cannot tell if he had anything in his hand or what he was hitting because the garbage cans were in the way.

She states that she was sure it was Aggie and that she couldn't miss that bald head."

Did you tell that to the state's attorney and the detective?

A Not all that.

Q Well, what is wrong with what I just told you?

A The last parts.

Q Which last part?

A That I was sure that it was him.

Q Did you see someone standing by a garbage can swing their arms?

A No.

Q So you are saying that the first part where you saw someone standing by a garbage can swinging an arm was correct; is that your testimony?

* * *

Q. You said not all of that is correct, is that right?

A Well, what I said on there was a lie but the last part -- I didn't give that last part.

Q You didn't give the last part about his bald head?

A Yeah, and if I was sure it was him, no.

Q You didn't put that on their either? Did you know Aggie to have a bald head?

A Did I what?

Q Did you know Aggie to have a bald head?

A No.

Q Did you continue on by saying and "she was looking at his face. She states she bent down and pretended to tie her shoe to try to get a better look at what he was doing. She states she then saw Aggie's girlfriend Lucy step in the alley out of the gangway which is Aggie's house. And that Lucy said here hurry up."

Did you tell that to the detectives and the state's attorney?

A Yeah.

Q Did they write that down in your statement?

A I don' t know.

Q Did you sign the statement knowing that it contained what I just read to you?

A I signed the statement.

Q My question was did you sign the statement knowing that it contained what I just read to you?

A No.

* * *

Q Was the last paragraph of the statement that you signed, did it contain these words. "Patricia states that she demonstrated her ability to read English by reading aloud a few sentences of this statement. Then Assistant State's Attorney Lawler then read aloud the entire statement while she followed along. She states she was allowed to make any corrections she wished."

Is that what your statement contained?

A I don't remember.

Q Did they give you anything to eat when you were at the police station, Ms. Negrete?

A I think so.

Q What did at they give you?

A I don't remember.

Q Did you tell the state's attorney and the detective and did you eventually have them write it down in the statement after you heard the person say here hurry up "Patricia Negrete states she started walking quickly away from the alley down 23rd Place and that Aggie looked up and saw her."

"She states she then heard Gizmo's voice coming from the alley by Aggie saying you got me already, you motherfucker. You got me already. She states Gizmo was screaming. She states she could not see Gizmo but she was sure it was his voice. She states that she ran home on Leavit Street."

Did you tell that to the state's attorney and the detective?

A Yes.

Q Did you have them write that down in the statement that was being prepared?

A I guess, yeah.

Q Did you sign the statement knowing that it contained that?

A I signed all the papers.

Q My question was did you sign the statement knowing that that was in there?

A I didn't read it.

Q That wasn't my question, Ms. Negrete. Do you have a problem upstanding my question? I can repeat it.

A Go ahead. Repeat it.

Q Did you sign the statement knowing that it contained the paragraph I just read to you?

A No.

Q Did you know what was in the statement that was prepared by the state's attorney?

A Yeah.

Q What was in the statement prepared by the state's attorney?

A What I said.

Q What did you say?

A That I seen who did it.

Q That what?

A That I seen who did it.

Q That you seen him?

THE COURT: Seen who did it.

Q. Who did you see do it?

* * *

A. I said I seen Aggie and Vicious doing it.

Q. You said you saw Aggie and Vicious do what.

A Kill Giz?

Q Kill what?

A Kill Gizmo.

Q It's your testimony that you told the state's attorney you saw Aggie and who kill Gizmo?

A. Vicious.

Q. And vicious kill Gizmo?

A. Yes.

Q. What did you see Vicious do?

A. Nothing.

Q. So you didn't see Vicious do anything?

A. Correct.

And your testimony today is that you told the police and the state's attorney that Vicious is someone you saw there that night?

* * *

A I didn't see nobody that night.

Q My question was did you tell the police and the state's attorney that you saw Vicious out there that night?

A Yes.

Q What did the tell the police and the state's attorney you saw Vicious do?

A I don't remember.

Q You don't remember?

A (Nodding.)

Q You told them you saw him do something?

A I don't remember what I had said.

Q Did you tell them you saw Vicious?

A Yeah, I told them I saw Vicious.

Q Where did you tell them you saw Vicious?

A In the alley.

Q Where at in the alley?

A Right there with Aggie.

Q So you told them you saw Vicious in the alley with Aggie?

A Yes.

Q - What did you tell them you saw Vicious do when he was in the alley with Aggie?

A I don't remember.

* * *

Q You didn't see Joe Trejo on Leavit that evening, did you?

A No.

* * *

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, vs. JOSE TREJO, Defendant, 96 CR 12773

REPORT OF PROCEEDINGS had at the hearing of the above-entitled matter, on the 6th day of March, 1997, before the Honorable THEMIS N. KARNEZIS, Judge of said court.

* * *

JUAN GARIBAY

called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q: Sir, I want to call your attention back to the 1st of November, 1995. Do you remember where you were living back then?

A: 2345 South Leavitt.

Q: And that building you were living in at 2345 South Leavitt, what type of a building is it?

A: It's a three story house with coach apartment.

Q: And where specifically did you reside?

A: On the second floor on the front.

* * *

Q: On the night of the 1st of November going into the 2nd of November, 1995, at approximately somewhere between 4:00 and 4:30 in the morning, do you remember where you were?

A: Yes, I was. I just came home a little while before that. I was taking – sleeping.

Q: And while you were sleeping Mr. Garibay, what, if anything, happened when you were sleeping?

A: I hear some loud shots and very loud – I thought it was right in the door steps or something, so I get out and I started looking around.

* * *

Q: Mr. Garibay, after you heard these shots, you stated that you started to look out. Where did you look out?

A: First because I wasn't sure if it was the alley or the street. I look up to the street, then I saw some people running away.

* * *

Q:... And when you saw these two people running, could you tell whether if they were men or women?

A: I know they were men coming the way the dress men.

* * *

Q: Okay. When you saw these two men running, Mr. Garibay, did you get a good look at them?

* * *

A: No.

* * *

Q: Okay. Were you able to get a look at the face of any of those two guys?

A: The last person that was running I don't know what person was. The last person running he look towards the west side, but it was just in a second as he turned.

Q: So one of the two individuals turned around?

A: Right.

Q: And when that person, that one individual turned around, did you get a look at his face?

A: Yeah, but it was like I told you it was like couple of seconds, couple of seconds.

* * *

Q: Now, Mr. Garibay, sometime later that month in November, somewhere around the 14th of November, do you remember when a police officer by the name of Sanchez came to talk to you?

A: Yes, I remember.

Q: And when Officer Sanchez talked to you, did he show you anything?

A: He show me the picture, but I cannot recall. I mean it was a book. I cannot recall, but he showed me some pictures.

* * *

Q: And when he showed you those pictures, Mr. Garibay, what did he ask you to do?

A: He asked me if any of those people match the person that was running.

Q: Okay. Did you look at those pictures that he gave you?

A: Yes, I did.

Q: And did you pick anybody out of those pictures that Officer Sanchez showed you?

A: I believe I pick up a person, right.

* * *

Q: You picked out the picture. Well, the picture, you picked out, Mr. Garibay, was that picture a picture of the person, one of the two people you saw running away?

A: I thought it was, but in my mind it was like a doubt on it, okay. Not really sure.

* * *

Q: You are telling us today that there was some doubt in your mind?

A: Right, because you know I get up after the noise and I look and I am not sure what I see after this point. There will be a doubt in my mind.

Q: And after Officer Sanchez had showed you those pictures, Mr. Garibay, do you remember being asked to look

at a line-up on the 15th of November at Harrison and Kedzie?

A. I don't remember the day, but I remember he came in. He took me down to the police station.

* * *

Q:... Who was that person that you picked out of the line-up?

A: I believe I think I tell them maybe look like this one person, maybe looked like this. I don't know. I couldn't remember exactly.

Q: So you don't remember exactly what you told the police when you picked him out?

A: No, I do not.

Q: You said maybe he looks like this person. Which person are you talking about?

A: The person who was running.

Q: Okay. And this person, Mr. Garibay, you saw that early morning that was running away, had you ever seen him before?

A: No, no.

Q: And had you ever seen him in the neighborhood back in June of that year of 1995?

A: No. They ask me before about a car. I told that somebody parked his car right on my sidewalk and the police tried to contact the person, but nobody ever came and claimed the car.

Q: And this person, this person that parked that car on your sidewalk, did you get a look at that person when he did that back in June?

A: Somebody just park the car and leave the car there and the police come and give him a ticket and this is what happened with the car, but it was nobody in the car.

* * *

CROSS EXAMINATION

Q: Okay. So you got up and you looked out your window, right?

A: I look my window. I look up towards the street, then I look up to the side.

* * *

Q: Now, I notice that you wear eye glasses?

A: Yes, I do.

Q: How would you describe for the judge your ability to see without the eye glasses?

A: I say very good. I got to use those for driving.

Q: You do wear you glasses all the time?

A: Yes, I do.

Q: With respect to sleeping, I assume you didn't have glasses on?

A: No, I don't sleep with it.

Q: When you looked out the window after hearing those shots, you didn't have any glasses on then, did you?

A: Not at the time I didn't put it on.

Q: When you looked out, you saw these people running down the alley. Did you have any eye glasses on?

A: No, I did not.

JAMES SANCHEZ

called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q: Could you tell the Court what Mr. Garibay said when you presented those photographs to him?

A: As far as the photo itself?

Q: Well, what did he say when you said he identified someone in these photographs?

A: He said that he pointed to Mr. Trejo's picture and said this is the person he seen running from the gangway after the shots.

Q: He said he looks like the person he seen running from his gangway when he heard the shots?

A: Yes, sir.

* * *

Q: What did Mr. Garibay tell you when the person he identifies as the whether he had seen him before?

A: He said he had seen him a few months before and that he had seen him in the neighborhood.

* * *

Q: And when you wrote your report concerning the identification by Mr. Garibay of this photo array, what words did you use?

A: "Tentative ID."

* * *

LUIS MUNOZ

called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

* * *

Q: What did you ask of Mr. Garibay?

A: I asked him if he saw anybody from that night.

Q: Did Mr. Garibay identify anyone in that lineup?

A: Yes.

Q: And who did he, Detective?

A: Jose Trejo

* * *